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NO.

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES CATTELL,

Petitioner,

—against—

ELIZABETH BARRETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Was the Estate's awareness, no later than May 1955, that Harold Blauer died at the New York State Psychiatric Institute after being injected with a mescaline-derivative by one of the Institute's physicians sufficient to establish accrual of a claim under 42 U.S.C. §1983 for deprivation of constitutional rights arising from the medical treatment of Blauer prior to his death?

2. Did the alleged cover-up after Blauer's death, pressed on behalf of the Estate as a deprivation of its property rights, give rise to a cognizable claim under 42 U.S.C. §1983?

3. Assuming, *arguendo,* the Estate may assert a constitutional claim on its own behalf, did the record nevertheless demonstrate that Dr. Cattell had no involvement in the alleged post-death cover-up?*

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* The parties to the proceeding in the United States Court of Appeals for the Second Circuit were Elizabeth Barrett, as Administratrix of the Estate of Harold Blauer, Deceased, Plaintiff-Appellant v. United States of America, Defendant-Appellee; Elizabeth Barrett, Plaintiff-Appellant v. David Marcus, Newton Bigelow, James Cattell, George Leonard, Van Sim, William Creasey, John Derrick, Harris North, Herbert Greer and the Estate of Amedeo Marazzi, Defendants-Appellees; Elizabeth Barrett, as an individual and as Administratrix DBN of the Estate of Harold Blauer, Deceased, Plaintiff-Appellant v. Frederick Lough, Defendant-Appellee.

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—against—

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 689 F.2d 324 (1982).

The opinion and order of the United States District Court for the Southern District of New York are reported at 521 F.Supp. 307 (1981).

Jurisdiction

The order of the United States Court of Appeals for the Second Circuit was entered on September 13, 1982. The petition of James Cattell for rehearing and suggestion for rehearing in banc was denied by an order of the United States Court of Appeals for the Second Circuit entered on December 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statute Involved

42 U.S.C. §1983 reads as follows:

> "§1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Statement of the Case

A. The work of the Psychiatric Institute.

The New York State Psychiatric Institute (the "Institute") was established as a research facility for the New York State Department of Mental Hygiene. The Institute's Department of Experimental Psychiatry was founded in 1948 under the leadership of Dr. Paul Hoch. Dr. Hoch was assisted by, among others, Dr. James Cattell, a board-certified psychiatrist. The Department of Experimental Psychiatry had two principal areas of interest: the study and treatment of schizophrenia.

By the early 1950's, Dr. Hoch was considered by his peers and the medical community as a leading expert in the field of experimental psychiatric research relating to the use of drugs in the psychiatric process. In addition, members of the Department of Experimental Psychiatry had accomplished a great deal of research in this area, had published many scientific papers relating to it, and were considered in the medical and scientific community as among the leaders in this area of medical specialty.

To better understand schizophrenia and aid in its treatment, the Department of Experimental Psychiatry performed pioneering work using various drugs that artificially created a schizophrenic-like state in humans. All patients who participated in these drug studies did so voluntarily and understood that experimental hallucinogenic drugs were being administered to them (Cattell Aff't, p. 11).* The cooperation of the patients was crucial to the

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* The affidavit of James Cattell ("Cattell Aff't") was filed in the United States District Court for the Southern District. The affidavit was not included in the Joint Appendix to the United States Court of Appeals for the Second Circuit, but was filed in that court.

success of the experiments and, therefore, the patients were free to discontinue their participation in the studies at any time (Cattell Aff't, p. 11-12).

The drugs primarily used in the studies were hallucinogenic drugs that altered perception and induced a schizophrenic-like state. A great deal of research was performed with mescaline, specifically mescaline sulfate obtained from pharmaceutical houses. Mescaline sulfate is an artificially produced drug with constant properties and components. As such, in performing its research, the Department of Experimental Psychiatry was compelled to use a constant, mescaline sulfate, upon a variable, namely the different patients. What was scientifically missing was the ability to perform further tests using a mescaline-derivative, a variable, upon the same patient, a constant. However, at the time in question, no pharmaceutical houses were producing mescaline-derivatives.

In the early 1950's, Dr. Cattell was informed by Dr. Hoch that the Institute would be receiving mescaline-derivatives from the United States Army and that these drugs would be used in the same manner and for the same medical purpose, namely to aid in the study and treatment of schizophrenia. Dr. Cattell was also informed that the results of the experiments would be supplied to the Army (Cattell, Aff't, p. 12).

Contracts were entered into between the United States Army and the Institute (J.A. 159-160).* Dr. Cattell never saw, nor was he aware of, any formal contract between the Army and the Institute (Cattell, Aff't, p. 2; J.A. 134). Specifically, Dr. Cattell was not aware of any relation-

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*References in parentheses preceded by "J.A." refer to pages in the Joint Appendix to the United States Court of Appeals for the Second Circuit, unless otherwise indicated.

ship between the drug studies he performed and the desire of the Army to learn information for chemical warfare purposes (Cattell Aff't, p. 14).

The drug studies were classified by the government and certain individuals, including Dr. Cattell, had security clearance. However, the only "classified" information known to Dr. Cattell was that the drug studies were being performed for the Army using drugs supplied by the Army (Cattell Aff't, p. 14). Significantly, after four years of discovery, the Estate has not produced a single document or obtained any testimony indicating that Dr. Cattell was aware of any other classified information with respect to the drug studies.

B. The death of Harold Blauer.

In the Fall of 1952, Harold Blauer was suffering from depression (William Douglas Dep. pp. 6-9). On December 5, 1952—after having been previously treated at Roosevelt Hospital and Bellevue Hospital—Mr. Blauer was admitted to the Institute in a depressed state and was diagnosed as suffering from schizophrenia. He was given a standard workup, including mental and physical examinations, by Dr. George Schnack. During his one-month course of treatment, Mr. Blauer was given traditional psychotherapy and voluntarily participated in the drug studies in which he was given mescaline-derivatives supplied by the Army. Drug studies were performed on Mr. Blauer on five separate occasions from December 1952 until January 1953 (J.A. 205-371).

Significantly, the hospital record pertaining to Mr. Blauer's treatment at the Institute contains numerous references to "drug studies," especially in the nurses' notes where Mr. Blauer's comments are entered (J.A. 290-

345). It is undisputed in the record that, following Mr. Blauer's death and the commencement of the action in the New York State Court of Claims, these hospital records were produced for inspection by the Estate's attorneys, who took copious notes on the chart (Charles Cohen Dep., pp. 108-120).

Mr. Blauer's friends were aware that he was receiving injections of drugs to assist in the treatment of his medical condition (William Douglas Dep., pp. 44-45). Moreover, it appeared that Mr. Blauer was making distinct progress in his treatment at the Institute (Eileen Douglas Dep., pp. 46, 57).

On January 8, 1953, while under medical attention, Mr. Blauer was injected with a mescaline-derivative. Shortly thereafter, he became unconscious, sustained rigidity of the neck, arms and legs, became blue and showed a distinct drop in blood pressure. Intravenous glucose, coramine and nasal oxygen were administered to him; and he showed a marked improvement. Then, he suddenly became pulseless, showed a decrease in blood pressure and expired. He was pronounced dead at 12:15 P.M. (J.A. 372).

C. The events following the death of Harold Blauer.

Following Mr. Blauer's death, Dr. Cattell filled out a "statement and particulars" to be submitted to the Medical Examiner of New York County (J.A. 372). The purpose of this form was to advise the Medical Examiner of Mr. Blauer's "symptoms" at death as stated on the form. Neither Dr. Cattell, nor any of the physicians in attendance at Mr. Blauer's death, was a forensic pathologist and the form was submitted in order to allow the Medical Examiner to know the symptoms of Mr. Blauer at death

and to permit the coroner to make an independent judgment regarding the cause of death. At the time that the autopsy was completed, the Medical Examiner not only had possession of the form completed by Dr. Cattell, but also Dr. Cattell's report, other patient information, a copy of the drug trial, a sample of the drug injected, and Mr. Blauer's corpse. After performing an autopsy on Mr. Blauer, the Deputy Chief Medical Examiner prepared an autopsy report which stated in pertinent part "Cause of Death: coronary arteriosclerosis, sudden death after intravenous injection of mescaline derivative." (J.A. 377).

1. The rentention of attorneys by the Estate to prosecute a wrongful death action.

Almost immediately after the death of Mr. Blauer, the firm of Kaye, Scholer, Fierman & Hays, which had been retained by Mr. Blauer's ex-wife, commenced an investigation into the facts and circumstances surrounding Mr. Blauer's death. On January 22, 1953, Harold Fierman wrote to the Institute requesting records (J.A. 386).* The Kaye, Scholer firm also contacted the Medical Examiner and ordered the coroner's report, hospital report and autopsy (J.A. 387-389).

Ultimately, Charles Cohen, an attorney with the Kaye, Scholer firm, was assigned to the case. On March 13, 1953, Mr. Cohen had a telephone conversation with Dr. Louis Winkelman, a psychiatrist who acted as a medical

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* Significantly, even at this time the Estate's attorneys were knowledgeable about Dr. Cattell's involvement in the treatment of Mr. Blauer. Mr. Fierman's letter to the Institute states in pertinent part: "Dr. Cattell at your hospital, I think, is familiar with the case." (J.A. 386).

advisor or expert to the Kaye, Scholer firm (Charles Cohen Dept., p. 240). Mr. Cohen's report on this conversation with Dr. Winkelman reveals suspicion that the drug in issue was experimental, testing may have been improper, and death was not due to a heart attack (J.A. 394). Similarly, in an inter-office memorandum, dated March 18, 1953, Mr. Cohen refers to the drug in issue as "an experimental drug." (J.A. 396).

The foregoing demonstrates that by March 1953, only two months after Mr. Blauer's death, the Estate and its attorneys had discovered through investigation many lay and medical facts regarding the death. The Estate had learned: the identity of Dr. Cattell and his involvement in the administration of mescaline-derivatives to Mr. Blauer; the findings contained in the autopsy report, which were questioned by the Estate's medical expert; and the fact that the mescaline-derivatives which had been administered to Mr. Blauer were experimental. It is undisputed in the record that as to Dr. Cattell, critical facts sufficient to identify him as one of Mr. Blauer's physicians and demonstrate his knowledge of the treatment of Mr. Blauer were known to the Estate and its attorneys within two months after Mr. Blauer's death.

2. The Court of Claims action.

The Estate commenced an action against the State of New York in the New York State Court of Claims on April 2, 1953. The Complaint in that action contained two causes of action which were both specific and highly informative with respect to critical facts learned by counsel in less than three months following the death of Harold Blauer. The Complaint is direct in its wording in establishing the basis for the plaintiff's claim for wrongful death, that is, that the drug administered to

Harold Blauer on January 8, 1953 was negligently prescribed and administered and that it caused his death (J.A. 154-155).

The Estate's expert, Dr. Baden, now avers that the autopsy report reference to "sudden death after intravenous injection of a mescaline-derivative, January 8, 1953" indicates a "temporal association between the death and the drug," not a causal relationship. Based on this averment, the Estate argues that it could not have been aware that the drugs administered to Mr. Blauer at the Institute caused his death. However, the language of the Complaint in the Court of Claims conclusively demonstrates that there was no confusion as to whether the administration of the mescaline-derivative was "temporal" or "causative," The Estate's attorneys were not confused; their theory of liability was that the mescaline-derivative had caused Mr. Blauer's death.

By June 1953 the Estate's attorneys had decided to seek production of medical records and depositions of medical witnesses. On January 4, 1954 the Estate's motion for discovery was granted by the Court of Claims. The Order granted the Estate leave to conduct depositions of Drs. Cattell and Schnack (a resident physician at the Institute and former defendant) and to apply for further depositions of persons with knowledge of the facts. In seeking Dr. Cattell's deposition, the Estate's attorneys described him as an individual with knowledge of the facts and circumstances of Blauer's death. Moreover, the Order allowing for Dr. Cattell's deposition directed that the Estate be provided with a photostatic copy of Mr. Blauer's hospital record (J.A. 399).

David Marcus, then an Assistant New York State Attorney General, was assigned to handle the Blauer case at the time of the Estate's discovery motion. After the motion

was granted. Marcus met with Drs. Hoch and Cattell. During the meeting, Marcus was advised of the basic facts of the Institute's role in drug therapy and research, but he was not told about the specific drug studies involving the Army, since this information was classified (Cattell Aff't, p. 16). Marcus then arranged to meet with representatives of the Army.

There ensued a series of meetings between Marcus, Dr. Hoch, members of the Army Chemical Corps, the Army Judge Advocate General's Office and, eventually, the Department of Justice. The nature of the drug studies at the Institute apparently was discussed during these meetings, which continued until the settlement of the Court of Claims action in May 1955.

It is undisputed in the record that Dr. Cattell never attended any of these meetings (Cattell Aff't, p. 17). Dr. Cattell is not referred to in any of the Army or Department of Justice documents as having been privy to any of the discussions or even knowledgeable of the subject matter of the discussions. It has never been challenged by any documents or testimony that Dr. Cattell did not participate in discussions concerning trial preparation, trial strategy or settlement of the Court of Claims action. In fact, the record conclusively demonstrates that the Estate has not made any allegation of an alleged act or omission by Dr. Cattell during the entire course of the Court of Claims action.

After issuance of the Order directing discovery, the Estate substituted the firm of O'Dwyer & Bernstein for the Kaye, Scholer firm (J.A. 409-410). Prior to the substitution of counsel, the Institute's hospital records had been supplied to the Kaye, Scholer firm and Charles Cohen had taken four pages of notes on the records (J.A. 403-406). *However, the O'Dwyer & Bernstein firm never took the*

depositions of Drs. Cattell and Schnack. The record is barren of any indication that the Estate's attorneys sought to enforce the discovery order.

This failure to depose Dr. Cattell is crucial. In mid-1954, the Army altered the security classification regarding the drug study program at the Institute. The alteration is discussed in a Judge Advocate General's memorandum, dated July 28, 1953, which states in pertinent part that "the security classification imposed on certain information pertaining to the mescaline-derivative furnished by the Chemical Corps to the New York State Psychiatric Institute and administered to the deceased Blauer had been removed by the Army Chemical Corps insofar as the name of the derivative, formula, physiological effects, psychiatric properties and diagnostic uses are concerned." (J.A. 411). After this alteration of the classification, Dr. Hoch advised Dr. Cattel that the source of the mescaline-derivatives was no longer classified and that, if questioned in a legal proceeding, Dr. Cattell could testify to the full extent of his knowledge concerning the drug studies (Cattell Aff't, p. 4). Thus, had the Estate deposed Dr. Cattell in mid-1954, pursuant to the court order, Dr. Cattell would have revealed the full range of his knowledge concerning the drug studies. Nevertheless, Dr. Cattell was never deposed; such being the choice of the Estate's counsel.

3. The settlement of the Court of Claims action.

In May 1955 settlement hearings were held before the Court of Claims. Dr. Cattell was not subpoenaed, nor did he testify at these hearings (J.A. 413-452). Thereafter, the action was settled for $18,000.00, after Marcus had informed the presiding judge, Fred Young, of the totality of the government's involvement in the drug studies (Mar-

cus Dep., pp. 179-182). Judge Young, with this knowledge, approved the settlement.

A release was prepared and sent to the Estate's counsel for approval (Marcus Dep., p. 216). A copy of the release was also forwarded to Dr. Cattell (J.A. 453). Significantly, the release ran in favor of the State, the Institute, the doctors, and "the organization, group, governmental body or agency which furnished the drug used in the drug studies which resulted in the death of Harold Blauer." (J.A. 455). It is undisputed in the record that the Estate's attorneys never asked for clarification of the language of the release. The release was executed by Amy Blauer on May 17, 1955.

D. The proceedings below.

In 1975 the Secretary of the Army revealed that the Army was the govermental body which had furnished the drugs the Institute had administered to Blauer. The three actions below were commenced, after the 1975 disclosure, by the present Administratrix of the Estate of Harold Blauer, against the United States under the Federal Tort Claims Act, and against certain individuals, including Dr. Cattell, under the Civil Rights Statute. In the district court, the defendants moved to dismiss the plaintiff's complaints as barred by the statute of limitations, res judicata and for failure to state a claim on which relief could be granted. The district court stayed determination of the issue pending discovery, and the parties then engaged in four years of extensive discovery, culminating in the submission of briefs, affidavits and documentary evidence to the district court.

On August 27, 1981, the district court (Judge Lawrence Pierce) held on summary judgment that these claims were

time-barred by the statute of limitations. He further granted defendants' motion to dismiss plaintiff's post-death §1983 claim, holding that plaintiff's only cognizable §1983 claim arose from events which occurred prior to the death of plaintiff's decedent.

On September 13, 1982 the Court of Appeals (Newman and Cardamone, C.J.J. and Burns, D.J.) reversed the judgment of the district court, and remanded the case for trial. On December 1, 1982 the Court of Appeals denied the petitions of the defendants Newton Bigelow, James Cattell, David Marcus and the United States of America for rehearing.

Substantiality of the Questions Presented

The court below erroneously concluded, directly contrary to the holding of this Court in *United States* v. *Kubrick,* 444 U.S. 111 (1979), that plaintiff's §1983 claim against Dr. Cattell did not accrue when plaintiff knew of the injury to Blauer and its cause, but only when plaintiff specifically learned of the United States' role in allegedly causing the injury. Although the court below concluded that "factual disputes as to the extent of the *government's concealment* and the diligence exercised by Blauer's Estate in the 1950's preclude us from disposing of this matter without a trial on these issues" (emphasis added), any factual dispute as to the extent of the government's concealment has absolutely no bearing on the accrual of the §1983 claim *as to Dr. Cattell.* It is undisputed that the identity of Dr. Cattell was known to the Estate immediately after Blauer's death. Moreover, Dr. Cattell's complete role in the treatment of Blauer was, or with even the slightest degree of diligence should have been, known by the Estate no later

than 1955. Accordingly, under *Kubrick,* plaintiff's §1983 claim as against Dr. Cattell was time-barred.

The sole cognizable constitutional claim in this case arises from the treatment of Blauer prior to his death. However, the Estate, through its present attorneys, expressly abandoned that theory on the summary judgment motion in the district court. In opposing summary judgment, the sole claim asserted by the Estate, on its own behalf, arose from the alleged conspiracy to cover-up the facts and circumstances of Blauer's death. The court below erroneously concluded, directly contrary to decisions of other federal courts of appeal on the same matter, that the alleged cover-up after Blauer's death, pressed on behalf of the *Estate* as a deprivation of *its* property rights, gave rise to a cognizable claim under §1983. As a matter of law, the alleged post-death cover-up was insufficient, by itself, to sustain a constitutional claim.

We submit that the decision below (1) is directly contrary to the holding of this Court in *Kubrick* as to the accrual of plaintiff's claims, (2) conflicts with decisions of other federal courts of appeal on the issue of the cognizability of a §1983 claim on behalf of the estate itself, and (3) creates a new kind of protected property interest in decedents' estates, characterized by the court below as "a statutory or common law entitlement to be fully compensated through a lawsuit for one's injuries." The importance of these issues, not only to the parties to this action but to the law in general, weighs heavily in favor of granting the writ.

ARGUMENT

POINT I

The Estate's awareness, no later than 1955, that Blauer died at the New York State Psychiatric Institute as the result of being injected with a mescaline-derivative by one of the Institute's physicians was sufficient to establish accural of a claim under 42 U.S.C. §1983 for deprivation of constitutional rights arising from the medical treatment of Blauer prior to his death.

In *United States* v. *Kubrick*, 444 U.S. 111 (1979), this Court held that a cause of action under the Federal Tort Claims Act accrues when a plaintiff becomes aware of the "critical facts" of his injury and its cause.* The Estate was aware of the fact of ultimate injury to Blauer—his death—in 1953. The only remaining issue under *Kubrick* is when the Estate became aware of the cause of injury, i.e., "who" caused the injury and "what" caused the injury. As set forth below, the "who" and "what" elements of causation as to Dr. Cattell were known by the estate no later than 1955. Thus, the §1983 claim is time-barred as to him.

1. The "who" element of causation as to Dr. Cattell was satisfied in 1953.

The Estate knew in 1953 that the State of New York, which operated the Institute, was involved in Blauer's

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* The court below assumed for the purpose of its opinion, without expressly deciding, that the test for §1983 claims is essentially the same as that in *Kubrick*. As to §1983 claims, "[t]he crucial time for accrual purposes is when the plaintiff becomes aware that he is suffering from a wrong for which damages may be recovered in a civil action." *Singleton* v. *City of New York*, 632 F.2d 185, 192-193 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981).

death. The identity and role of Dr. Cattell, one of Blauer's treating physicians at the Institute, also was known to the estate at the time of Blauer's death.*

Citing *Liuzzo* v. *United States*, 484 F.Supp. 1274 (E.D. Mich. 1980), the court below held that: "[t]his case presents an instance in which knowledge of the identity of the tortfeasor is a critical element to the accrual of a claim." In this action, however, the estate was ignorant only of the involvement of the government. Unlike the plaintiffs in *Liuzzo*, the estate in the instant action was aware of the identity and role of Dr. Cattell no later than 1953.

As the district court correctly held, it is not necessary to know the identity or status of all tortfeasors in order for a cause of action to accrue. *See, e.g., Wollman* v. *Gross*, 637 F.2d 544, 551 (8th Cir. 1980); *Steele* v. *United States*, 599 F.2d 823, 826 (7th Cir. 1979); *West* v. *United States*, 592 F.2d 487, 492 (8th Cir. 1979). Accordingly, any factual dispute as to the extent of the government's concealment of its identity as the supplier of the drug has absolutely no bearing on the accural of the §1983 claim as to Dr. Cattell. Thus, the "who" element of causation as to Dr. Cattell was satisfied in 1953.

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* The record demonstrates that the Estate's then attorneys were knowledgeable about Dr. Cattell's involvement in the treatment of Blauer no later than January, 1953. At that time, the Estate's attorney wrote to the Institute, stating in pertinent part: "Dr. Cattell at your hospital, I think, is familiar with the case." (J.A. 386). The fact that the estate sought, and obtained in mid-1954, a court order for the deposition of Dr. Cattell in the context of the Court of Claims action further confirms that the Estate was aware of the identity and role of Dr. Cattell.

2. The "what" element of causation as to Dr. Cattell was satisfied no later than 1955.

The court below concluded that, as to the government, the "what" element of the causation inquiry arguably was unknown to the plaintiff until 1975. Citing *Ware* v. *United States*, 626 F.2d 1278 (5th Cir. 1980), the court stated:

> "Blauer's family knew that he had died and that the direct cause of death was, at least partly, the mescaline injection. What it was unaware of and had no reason to suspect, as in *Ware*, was that this was a death without reason caused by the government's alleged negligence."

The government's conduct here may be similar to that in *Ware*, but the case is inapposite as to Dr. Cattell. In *Ware*, the plaintiff commenced a Federal Tort Claims Act action against the United States for damages sustained when the government destroyed his cattle after negligently diagnosing them as having tuberculosis. The court held that it was not until the plaintiff knew that there had been a misdiagnosis that his claim accrued; prior to that, although he knew he had suffered a loss, he was unaware that there had been negligence giving rise to the liability on *anyone's* part. Here, Blauer's family may have been unaware of the "government's alleged negligence"; however, the record demonstrates that the estate immediately concluded after Blauer's death that there had been negligence giving rise to liability on the part of the State of New York as the result of the alleged negligent treatment of Blauer by Dr. Cattell. Thus, the *Ware* case actually supports Dr. Cattell's position.

The Estate does not dispute that it had access to the autopsy report which described Blauer's death and re-

vealed that it had occurred within two hours of an injection of mescaline-derivative. (J.A. 53). Indeed, the complaint filed in the New York State Court of Claims action charged that Blauer was negligently injected with a "toxic and dangerous" substance which made him ill and *resulted* in his death. (Ct. of Claims Complaint, ¶¶13, 14; J.A. 154-55). The files of the Estate's original attorneys are replete with reference to the drugs. (J.A. 382, 394). At the Court of Claims settlement on May 17, 1955, Dr. Paul Hoch testified that Blauer had "died directly as a result of the injection of drugs into his body." (J.A. 446). Finally, Amy Blauer's petition to the Surrogate of Nassau County stated: "[t]hat on January 8, 1953, while decedent was a patient at the New York State Psychiatric Institute, a drug was administered which resulted in his death." (J.A. 534). Whatever concealment there may have been on the part of the government, these documents demonstrate conclusively that as to Dr. Cattell the estate was aware of "what" had caused Blauer's death no later than 1955.

We recognize, as did the court below, "that this is not an action for simple malpractice." Rather, the §1983 claim is predicated on the alleged non-therapeutic administration of the mescaline-derivative to Blauer.* The record conclusively demonstrates, however, that the Estate could have framed an identical §1983 claim, for alleged non-therapeutic administration of drugs to Blauer, as against Dr. Cattell immediately after Blauer's death. In March,

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* We submit that the repeated reference to Blauer as a "human guinea pig" by the court below simply is not supported by the record. Whatver the government's purpose may have been in supplying the mescaline-derivative to the Institute, it is uncontradicted in the record that the Institute physicians administered the drugs to patients, like Blauer, to study and treat schizophrenia. (Cattell Aff't., p. 11-12; J.A. 134).

1953, Charles Cohen, one of the Estate's attorneys, had a telephone conversation with Dr. Louis Winkelman, a psychiatrist who acted as a medical advisor or expert to the estate's attorneys. (Charles Cohen Dep., p. 240). Mr. Cohen's report on this conversation with Dr. Winkelman reveals suspicion that the drug in issue was experimental, testing may have been improper, and death was not due to a heart attack. (J.A. 394). Similarly, in an inter-office memorandum, dated March 18, 1953, Mr. Cohen refers to the drug in issue as "an experimental drug." (J.A. 396).

The foregoing demonstrates that by March, 1953, only two months after Blauer's death, the Estate and its attorneys had discovered through investigation: the identity of Dr. Cattell and his involvement in the administration of mescaline-derivatives to Blauer; the findings contained in the autopsy report, which were questioned by the Estate's medical expert; and the fact that the mescaline-derivatives which had been administered to Blauer were experimental. Consequently, as to Dr. Cattell, the estate could have framed a §1983 claim, predicated on the alleged non-therapeutic administration of mescaline-derivatives to Blauer, immediately after Blauer's death.

To summarize, application of the "discovery" rule in *Kubrick* merely postpones the accrual of the §1983 claim as to Dr. Cattell from January, 1953 when Blauer died until, at the latest, May, 1955 when the Estate had knowledge of the "critical facts" of Blauer's injury and its cause. The §1983 claim as to Dr. Cattell is, therefore, time-barred.

3. As to Dr. Cattell, there is no need to reach the purported factual dispute as to whether diligence was employed by the Estate.

The court below concluded that "the instant situation is unusual because even if the plaintiffs knew what caused Blauer's death, the path to unmasking who was responsible may well have been blocked." As to Dr. Cattell, however, the "diligent inquiry" issue is irrelevant because Dr. Cattell was aware *only* that the Army was the *source* of the mescaline-derivatives. (Cattel Aff't., pp. 12-14; J.A. 134). Dr. Cattell was not aware of any relationship between the administration of the mescaline-derivatives by him and the desire of the Army to learn information for chemical warfare purposes. (Cattell Aff't., p. 14). After four years of discovery, the Estate has not produced any evidence to the contrary.

The court below noted that "[i]n defending the 1953 Court of Claims action Assistant Attorney General Marcus, as discussed earlier, deliberately prevented the scheduling of depositions." Even if "the path to unmasking who was responsible may well have been blocked" by Marcus, a point we do not concede, there is no evidence that Dr. Cattell attempted to, or could have, prevented his own court-ordered deposition.

Regardless of what the Estate may argue, it cannot deny that it had the absolute right to depose Dr. Cattell, pursuant to court-order, in mid-1954. Nevertheless, through no fault of his own, Dr. Cattell was never deposed. This failure to depose Dr. Cattell is crucial. Had the estate deposed Dr. Cattell, he would have testified to the full extent of his knowledge concerning the administration of the mescaline-derivatives to Blauer. (Cattell Aff't., p. 4). Had the estate bothered to ask, Dr. Cattell would have revealed the source of the mescaline-derivatives. Of course, as dis-

cussed earlier, he could not have revealed the purpose of the Army in supplying the mescaline-derivatives because he had no knowledge as to the Army's purpose.

Essentially, the court below held that the accrual of the Estate's §1983 claim depended upon knowledge of all facts that would be helpful or relevant at trial. This is not the law. *E.g., Ashley* v. *United States,* 431 F.2d 490 (9th Cir. 1969); *Brown* v. *United States,* 353 F.2d 578 (9th Cir. 1965). In any event, even if it were the law, Dr. Cattell could not have revealed the goverment's purpose, as he was not aware of it.

POINT II

The alleged cover-up after Blauer's death, pressed on behalf of the Estate as a deprivation of its property rights did not give rise to a cognizable claim under §1983.

In *Barrett* v. *Hoffman,* 76 Civ. 381, the plaintiff Elizabeth Barrett brought suit individually under §1983, claiming that an alleged conspiracy "to conduct a wide-scale experimental drug program on human subjects" (Complaint ¶32) and "to cover-up the existence of the aforementioned wide-scale experimental drug program upon human subjects" (Complaint ¶34), accomplished under color of state law, deprived Blauer of his constitutional rights. By its terms, the complaint in this action, the only action in which Dr. Cattell has been named as a defendant, does not contemplate any proof of a conspiracy after Blauer's death.

On the summary judgment motion, however, the gravamen of the plaintiff's §1983 claim was that the defendants' alleged conspiracy to withhold from the Estate various facts necessary to a fair settlement of the Estate's claims

arising from Blauer's death deprived the Estate of property without due process. As the plaintiff set forth in the submissions in opposition to the defendant's motions, "the basis of the §1983 suits is the conspiracy to cover-up the facts and circumstances of Harold Blauer's death." (J.A. 549). The reason for this significant alteration of the constitutional claim advanced in this action is obvious. Having failed to adduce substantial proof against any defendant other than the government after four years of discovery, the plaintiff was constrained to advance this novel theory in an attempt to state a §1983 claim against the non-government defendants.

The district court rejected the claim pressed on behalf of Blauer's estate, reasoning that "there is no duty imposed on a party—government or non-government—to voluntarily disclose evidence or a cause of action in a civil suit. *Hauben* v. *Harman,* 605 F.2d 920, 924 (5th Cir. 1979)." (J.A. 43). The court below nevertheless sustained both theories as against the defendants in the §1983 action on appeal. We submit that the court's holding, at least as to the post-death conspiracy theory, is erroneous and conflicts with decisions of other federal courts of appeal on the same matter.

To state a conspiracy in violation of the civil rights of Blauer, his Estate must prove the existence of the conspiracy while he was alive. Other federal courts of appeal have consistently held that the civil rights of a deceased cannot be violated because subsequent to his death he is not a "person" within the meaning of the statute. *See, Silkwood* v. *Kerr-McGee,* 637 F.2d 743 (10th Cir. 1980), *cert. denied,* —— U.S. ——, 102 S.Ct. 132 (1981); *Guyton* v. *Phillips,* 606 F.2d 248, 250 (9th Cir. 1979), *cert. denied,* 445 U.S. 916 (1980); *Whitehurst* v. *Wright,* 592 F.2d 834 (5th Cir. 1979). Thus, proof of the alleged post-death cover-up alone would not be suf-

ficient to sustain a §1983 claim. *See, Hampton* v. *Hanrahan,* 600 F.2d 600, 622 (7th Cir. 1970), *rev'd in part on other grounds,* 446 U.S. 754 (1980). The contrary holding of the court below should be reviewed by this Court.

In a transparent attempt to circumvent the foregoing case law, the plaintiff has argued that the Estate's §1983 claim is not a simple devolution of the §1983 claim which Blauer may have possessed, but is an entirely new claim. This argument is purely semantical. Although an action may be brought by a decedent's personal representative (New York E.P.T.L. §11-3.2), neither the personal representative nor the "estate" has any greater rights than the decedent himself. Since Blauer's civil rights effectively terminated with his death, his estate cannot now claim on its own behalf a violation of his civil rights after his death.

POINT III

Assuming, *arguendo*, the Estate may assert a constitutional claim on its own behalf, the record nevertheless demonstrates that Dr. Cattell had no involvement in the alleged post-death cover-up.

The Estate has alleged three broad areas of "concealment" by the defendants after Blauer's death: (a) "the withholding of documents ordered to be produced"; (b) "the false statements that Blauer's death was due to a heart condition"; and (c) "the *ex-parte* conference and the fraudulent settlement hearing." Of course, there is not one shred of proof that Dr. Cattell withheld any documents ordered to be produced or had any involvement in any aspect of the Court of Claims litigation, including the settlement of that action. In fact, the sole wrongful act alleged as against Dr. Cattell is the pur-

ported "falsification of the autopsy report" after Blauer's death.

According to the Estate, Dr. Cattell's participation in this "falsification" was the submission of a one-page report to the Medical Examiner's Office, which allegedly misstated and omitted facts surrounding Blauer's death. The Estate further argues that this purported "falsification"— which occurred prior to the retention of counsel by the Estate, prior to any claim, and prior to the Court of Claims litigation—constitutes a deprivation of its constitutional rights. To the contrary, this alleged concealment is irrelevant because the record is devoid of any indication that the Estate actually was misled by Dr. Cattell's report.

First, the Estate ignores the undisputed fact that a Deputy Chief Medical Examiner of the City of New York performed an *independent autopsy* on Blauer the day after his death (J.A. 376). At the time that this autopsy was completed, the Medical Examiner not only had possession of the report completed by Dr. Cattell, but also of other patient information, a copy of the drug trials, a sample of the drug injected, and Blauer's corpse (Cattell Aff't., pp. 15-17). The Medical Examiner's autopsy report stated in pertinent part: "Cause of Death: coronary arteriosclerosis, sudden death after intravenous injection of a mescaline derivative" (J.A. 377). Thus, even if Dr. Cattell's report was "misleading", the independent autopsy established a *causal* relationship between Blauer's death and the mescaline-derivative.

Second, the record demonstrates that the Estate was not misled by Dr. Cattell's report. Although the Estate's expert, Dr. Baden, avers that the Medical Examiner's independent autopsy report indicates only a "temporal association between the death and the drug," not a causal rela-

tionship, this argument "is belied by the language of Amy Blauer's complaint in the New York State Court of Claims, the references to the drug in the files of Amy Blauer's attorney, the testimony of Dr. Paul Hoch at the settlement hearing on May 17, 1955, and Amy Blauer's petition to the Surrogate of Nassau County in April of 1956." (J.A. 46). Each of these documents unequivocally indicates a causal, as opposed to temporal, relationship between the death and the drug.

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The court below failed to differentiate in its opinion between the various defendants and their respective alleged wrongful acts. The separate alleged wrongful acts of the government and non-government defendants may not be amalgamated for statute of limitations purposes into a single transaction by giving them the label of a "conspiracy." The Estate could have, but once again chose not to, depose Dr. Cattell during the discovery proceedings in the district court. Instead, the estate relied on the one-page report submitted by Dr. Cattell to the Medical Examiner. As demonstrated by the record, however, there is no evidence that the Estate actually was misled by Dr. Cattell's report. After four years of discovery in this action, the estate has failed to produce a single piece of evidence raising a *genuine* issue of material fact as to any concealment or participation in the alleged "conspiracy" by Dr. Cattell. Thus, the court below should have affirmed the grant of summary judgment in favor of Dr. Cattell in all respects.

CONCLUSION

The petitioner respectfully urges that the important issues presented in this case, as well as the inconsistency of the conclusions of the court below with decisions of this Court and decisions of other federal courts of appeal, should be reviewed by this Court. For the foregoing reasons, it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: February 23, 1983

Opinion of the United States Court of Appeals For the Second Circuit

Elizabeth BARRETT, as Administratrix of the Estate of Harold Blauer, Deceased,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Elizabeth BARRETT,
Plaintiff-Appellant,

v.

David MARCUS, Newton Bigelow, James Cattell, George Leonard, Van Sim, William Creasey, John Derrick, Harris North, Herbert Greer and the Estate of Amedeo Marazzi,
Defendants-Appellees.

Elizabeth BARRETT, as an individual and as Administratrix DBN of the Estate of Harold Blauer, Deceased,
Plaintiff-Appellant,

v.

Frederick LOUGH,
Defendant-Appellee.

Nos. 748, 863 and 864, Dockets 81-6192, 81-7690 and 81-7700.

United States Court of Appeals,
Second Circuit.

Argued March 10, 1982.

Decided Sept. 13, 1982.

Stuart L. Land, Washington, D.C. (Stephen M. Sacks, Richard P. Schifter, Arnold & Porter, Washington, D.C., Herbert K. Lippman, New York City, Richard A. Matasar, Ames, Iowa, of counsel), for plaintiffs-appellants.

Susan Millington Campbell, Asst. U.S. Atty., New York City (John S. Martin, Jr., U.S. Atty. for the Southern District of New York, Richard N. Papper, Asst. U.S. Atty., New York City, of counsel), for defendant-appellee United States of America.

Frederick H. Block, New York City, for defendant-appellee David Marcus.

Paul L. Pileckas, Rome, N.Y. (Pileckas & Pileckas, Rome, N.Y., of counsel), for defendant-appellee Newton Bigelow.

Steven J. Ahmuty, Jr., New York City (Bower & Gardner, New York City, of counsel), for defendant-appellee James Cattell.

Before NEWMAN and CARDAMONE, Circuit Judges, and BURNS, District Judge.*

CARDAMONE, Circuit Judge:

Today's average citizen would doubtless be appalled, but probably not surprised, to learn that in the early 1950's, while conducting a chemical warfare experiment, the United States Army used certain individuals as test subjects. The experiment is shocking not because of its existence, but because the chemical tests were performed on these human guinea pigs without their consent. The individuals involved were not told that they were the subjects of an experi-

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* Honorable Ellen B. Burns, Judge of the United States District Court for the District of Connecticut, sitting by designation.

mental and highly dangerous chemical warfare program. The case before us concerns one such subject who died after having a test drug administered to him.

In August 1975 the Secretary of the Army revealed that twenty-two years earlier Harold Blauer, a male civilian voluntarily undergoing treatment at the New York State Psychiatric Institute, died from the injection of a mescaline derivative administered to him while he unknowingly served as a test subject in an Army chemical warfare experiment. Following this startling disclosure Blauer's daughter, Elizabeth Barrett, commenced a number of actions both individually and as the administratrix of Blauer's estate, alleging negligence in the creation and administration of the drug testing program and conspiracy to cover up the facts surrounding her father's death. She sought relief primarily under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.* (FTCA), and the civil rights provisions of 42 U.S.C. § 1983. The defendants moved to dismiss on numerous grounds, including failure to state a claim, lack of personal jurisdiction, res judicata, statute of limitations, immunity, release and lack of standing. After permitting four years of discovery and considering voluminous submissions the district court concluded that "there are no genuine issues of material fact which must be determined at trial relevant to the issue of when plaintiffs' cause of action accrued," *Barrett* v. *Hoffman*, 521 F.Supp. 307, 314 (S.D.N.Y. 1981); it thereupon dismissed the claims as time-barred.

We are mindful that in our determination of this appeal we must restrain our personal abhorrence of the deplorable conduct displayed by the Army. With such constraint firmly applied, we find, nevertheless, that a number of dis-

puted factual issues relating to accrual of these causes of action have been raised which compel us to conclude that plaintiffs must be afforded their day in court. We express no opinion as to the appropriate disposition of these issues at trial.

For the sake of brevity and in deference to the well written opinion below we assume familiarity with the background facts, procedural history and legal analysis outlined by the district court in *Barrett* v. *Hoffman, supra.*

I

We begin, therefore, by turning to the question of when plaintiffs' cause of action under the Federal Tort Claims Act accrued. Title 28 U.S.C. § 2401(b) (1976) provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . ." It has generally been held that under the FTCA a tort claim accrues at the time of the plaintiff's injury, although in certain instances, particularly in medical malpractice cases, accrual may be postponed until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause. *United States* v. *Kubrick,* 444 U.S. 111, 120 n. 7, 100 S.Ct. 352, 358 n. 7, 62 L.Ed.2d 259 (1979); *Stoleson* v. *United States,* 629 F.2d 1265, 1268 (7th Cir. 1980); *Waits* v. *United States,* 611 F.2d 550, 552 (5th Cir. 1980); *Steele* v. *United States,* 599 F.2d 823, 827-28 (7th Cir. 1979); *Lee* v. *United States,* 485 F.Supp. 883, 885-86 (E.D.N.Y. 1980); *Liuzzo* v. *United States,* 485 F.Supp. 1274, 1280 (E.D. Mich. 1980).

The diligence-discovery rule of accrual is not often applied outside the medical malpractice area, *see, e.g., Steele,*

599 F.2d at 828, but may be appropriate in non-malpractice cases, *Liuzzo*, 485 F.Supp. at 1281, where plaintiffs face comparable problems in discerning the fact and cause of their injuries, *Stoleson*, 629 F.2d at 1269. Thus, any plaintiff who is blamelessly ignorant of the existence or cause of his injury should be accorded the benefits of the more liberal accrual standard. *Id.*

For example, the diligence-discovery rule has been applied where a plaintiff demonstrates that his injury was inherently unknowable at the time he was injured, *Quinton* v. *United States*, 304 F.2d 234 (5th Cir. 1962), and where the Government conceals its negligent acts so that the plaintiff is unaware of their existence, *Peck* v. *United States*, 470 F.Supp. 1003, 1018 (S.D.N.Y. 1979). In regard to the latter situation, "[r]ead into every federal statute of limitations . . . is the equitable doctrine that in case of defendant's fraud or deliberate concealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit." *Fitzgerald* v. *Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977).

Although the existence of Blauer's injury (death) was clearly evident in the 1950s, we are faced with plaintiffs' allegations that the Army Chemical Corps actively covered up both its involvement in the affair and the nature of its misdeeds. If true, the substance of these allegations would constitute deliberate concealment of material facts relating to the Government's wrongdoing and would trigger application of the diligence-discovery accrual standard . Plaintiffs presented evidence to support these assertions which was disputed, though not substantially controverted, by the Government.

For example, internal agency memoranda indicate that even after the Army agreed to declassify (from the previously "Secret" category) the nature of the drug which killed Blauer it insisted that, if revealed, the source of the drug should be identified as the Army Medical Corps rather than the Army Chemical Corps. In addition, the warfare research purpose for developing the compound and for administering it to Blauer was to remain classified defense information. Thus, there would only remain the deliberate false impression that the drug used on Blauer was administered for therapeutic purposes. When Blauer's estate brought a tort action in the New York State Court of Claims in 1953, Marcus, the Assistant Attorney General of New York responsible for defense of the suit, was "forcibly informed" that the legal proceedings should be limited to the "medical aspects" of the case; he was urged to postpone indefinitely the previously scheduled depositions of Institute doctors because, "due to security classification," they "would probably not be able to answer the questions which would be propounded." Marcus was further informed that nobody would be permitted to testify or disclose information "under threat of prosecution under the Espionage Act." The Army repeatedly urged that certain Institute documents connecting the Government with these events be turned over to the Army while litigation was pending so that, according to an Army memorandum, they could be placed "beyond the subpoena power of the plaintiff." Finally, when the suit was settled for $18,000 in 1955 the Government agreed to pay half of the settlement on the condition that its role and purpose for supplying the drug would be kept secret.

When this evidence of intentional concealment of material facts relating to the Army's responsibility in the mat-

ter of Blauer's death is considered, it appears that application of the diligence-discovery rule is warranted in this case. Consequently, plaintiffs' cause of action accrued when they discovered or should have discovered the critical facts of Blauer's injury and its cause. *Kubrick, supra.* Since the injury was immediately known, the crucial question is when Blauer's family should have discovered the critical facts relating to the cause of his death.

The Supreme Court recently discussed the extent of knowledge which a plaintiff must possess in order for his claim to accrue under the FTCA. *Id.* in *Kubrick* the plaintiff argued that his FTCA claim did not accrue when he knew that he had suffered a hearing loss which probably resulted from treatment with an antibiotic. He insisted that the claim accrued when he was first informed that the antibiotic was negligently administered. The Court rejected this contention because the plaintiff, armed with the knowledge that the antibiotic caused the injury, could simply have consulted experts to discover that he had a cause of action for negligent administration of the drug. The Court stated:

> We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and *the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain.* The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and *who* has inflicted the injury. He is no longer at the mercy of the latter.

Kubrick, 444 U.S. at 122, 100 S.Ct. at 359 (emphasis added).

The Government, apparently viewing this case as a routine medical malpractice action like *Kubrick*, contends that the cause of death was injection of the drug and that this was known to the estate in 1953 or, at the latest, when the Court of Claims action was settled in 1955. One serious flaw in its analysis, however, is that this is not an action for simple malpractice. Comparison of the allegations in the Court of Claims complaint, which was based on malpractice, with those in the present suit illustrate the distinction. In its suit against New York State Blauer's estate alleged that the defendant's incompetent and inexperienced agents were negligent in administering an overdose of a toxic substance to which the decedent had previously suffered an adverse reaction, and in applying improper care to revive Blauer after the injection. These critical facts were known in the 1950s. By way of contrast, the plaintiffs in the present suit contend that the United States Government was negligent in creating, administering and supervising a program pursuant to which the decedent was involuntarily given an untested drug "solely for experimental purposes" and "without any proper diagnostic or therapeutic purposes." The gravamen of the FTCA claim is that the real reason Blauer died was not medical incompetence, but the fact that he was used as a human guinea pig. These critical facts concerning causation were not known and probably not discoverable until the Army made its disclosure in 1975.

Thus, critical facts about causation and who inflicted Blauer's injury were in the control of the Government and very difficult for his estate to obtain. Indeed, the evidence

indicates that some critical facts, such as the identity of the tortfeasor and the purpose for administering the drug, would not have been revealed no matter how diligently the estate had pursued its case in the 1950s.

It is not even clear that Blauer's family knew that he died solely as the result of administration of the drug. Although the estate sought and obtained a discovery order in the Court of Claims action for all records relevent to Harold Blauer, some documents were not made available (e.g., minute-by-minute detailed descriptions of decedent's reactions to the drug injections), see *Waits* v. *United States*, 611 F.2d 550 (5th Cir. 1980), and others contained material misrepresentations (that the drug study was for diagnostic and therapeutic purposes, that Blauer's reaction to the drug was "atypical" and that he had previously received the drug "with no untoward response"). Relying on this same false and misleading information the coroner's office issued an autopsy report which listed the cause of death as "Congestion of the Viscera; *Coronary arteriosclerosis;* Sudden death after intravenous injection of a mescaline derivative" (emphasis added). This report led to the further misimpression that a heart condition was at least partly responsible for Blauer's demise. To show that a factual issue concerning the cause of death existed in 1953-1955, plaintiffs have submitted an affidavit from the Deputy Chief Medical Examiner for the City of New York stating that had the true facts been known the autopsy report would have noted the cause of death as "Convulsive seizures, hypotension and cardio-respiratory arrest immediately following and due to intravenous injection of a mescaline derivative for investigative purposes." Although the estate was probably aware in the 1950s of the connec-

tion between the injection and the decedent's death, Amy Blauer may well have settled the Court of Claims suit for a significantly lesser sum than she would otherwise have insisted upon had she known that the drug, whether therapeutic or not, was the sole cause of death. The extent of Amy Blauer's knowledge concerning the cause of death is therefore another factual issue going to accrual which must be resolved at trial.

The situation in this case is similar to that presented in *Ware* v. *United States,* 626 F.2d 1278 (5th Cir. 1980). The Department of Agriculture had mistakenly found Ware's cattle to be suffering from tuberculosis and ordered them killed. Ware was permitted to sue the Government more than two years (the applicable limitations period) after the event. He immediately knew of the injury, the death of his cattle, and its direct cause, that they were put to death. The critical causative fact that he did not know until later was that they need not have been slaughtered. Likewise, Blauer's family knew that he had died and that the direct cause of his death was, at least partly, the mescaline injection. What it was unaware of and had no reason to suspect, as in *Ware,* was that this was a death without reason caused by the Government's alleged negligence.

Not only was the "what" element of the causation inquiry arguably unknown to the plaintiffs until 1975, but the "who" element was also missing from the puzzle. See *Barrett,* 521 F.Supp. at 317. Cases which have held that the identity of the Government as a potential defendant need not be known to a plaintiff in order for his FTCA cause of action to accrue involved situations where the "who" element was not actively being concealed. In those cases diligent discovery would have revealed the Govern-

ment's role. *See, e.g., Wollman* v. *Gross*, 637 F.2d 544 (8th Cir. 1980), *cert. denied*, 454 U.S. 893, 102 S.Ct. 389, 70 L.Ed. 2d 207 (1981); *Steele, supra; West* v. *United States*, 592 F. 2d 487 (8th Cir. 1979); *Lien* v. *Beehner*, 453 F.Supp. 604 (N.D.N.Y. 1978).

Here there exist factual disputes both as to whether diligence was employed by the estate without success and whether the role of the Army Chemical Corps would in any event have been revealed. Thus, the instant situation is unusual because even if the plaintiffs knew what caused Blauer's death, the path of unmasking who was responsible may well have been blocked. It is illogical to require a party to sue the government for negligence at a time when the Government's responsibility in the matter is suppressed in a manner designed to prevent the party, even with reasonable effort, from finding out about it.

Like *Liuzzo*, 485 F.Supp. at 1283, "[t]his case presents an instance in which knowledge of the identity of the tortfeasor is a critical element to the accrual of a claim." In *Liuzzo* the children of a slain civil rights worker were permitted to bring an action under the FTCA many years after their mother's death. At that time it was revealed that a paid informant, whose testimony had helped convict certain Ku Klux Klansmen of the murder, had personally participated in the killing. There, as here, misrepresentations and concealed information had justifiably led the plaintiffs to believe that those responsible for their parent's death had been punished. The court in *Liuzzo* concluded that, based on the information known at the time, the plaintiffs had no reason to investigate further the cause of their mother's death because they justifiably believed the three apprehended Klansmen were responsible. The Court also

stated that even if the children were obligated to look more deeply into the matter, it was not clear that the FBI would reasonably have been a target of their inquiry.

Similarly, Blauer's family had no reason to investigate any further based on the information available to it in the 1950s. It was deliberately led to believe that the cause of death was a therapeutic injection of mescaline which had possibly aggravated a preexisting heart condition. Moreover, even if the family had cause to pursue the matter it would have had even less reason to focus on the Army Chemical Corps as a target of its investigation than the Liuzzo children had to center on the F.B.I. (which the Liuzzos at least knew had agents working within the Klan). Even if Blauer's estate had probed so far as to discover the source of the drug, it would have been given the innocuous misinformation that the supplier was the Army Medical Corps.

In short, factual disputes as to the extent of the Government's concealment and the diligence exercised by Blauer's estate in the 1950s preclude us from disposing of this matter without a trial on these issues. We cannot conclude that as a matter of law the FTCA claim accrued prior to 1975.

II

In addition to their FTCA cause of action against the United States Government, plaintiffs present a broad civil rights claim against various individuals based on 42 U.S.C. § 1983 (1976), which they argue in two parts:

1. A conspiracy to perform non-therapeutic chemical tests on the decedent carried out under color of state law

caused him to suffer personal injury amounting to cruel and unusual punishment and a deprivation of his constitutional rights to life, liberty, property and equal protection.

2. As the result of a conspiracy carried out under color of state law to cover up the true facts surrounding Blauer's death, the decedent's estate/beneficiaries were deprived of their constitutional right to property, consisting of their causes of action for reasonable compensation for Blauer's death, without due process of law.

In regard to the latter, plaintiffs are not stressing that the defendants had an affirmative duty to come forward with evidence but, rather, that there was a conspiracy deliberately to keep the truth from his widow Amy Blauer.

By order dated September 9, 1976 the district court ruled that the first of these assertions alleged deprivations of constitutional dimension and stated a valid § 1983 claim. As the court below noted, requisite state action is sufficiently alleged in the complaints' assertions that Blauer's death resulted from a contract entered into by a state-created institution established under New York Mental Hygiene Law § 420, and that the illegal acts complained of were performed by state-employed physicians while Blauer was in the state-maintained facility. Constitutional deprivation is found in the allegation that the defendants performed drug experiments in a manner which "shocks the conscience," *Rochin* v. *California*, 342 U.S. 165, 172, 72 S. Ct. 205, 209, 96 L.Ed. 183 (1952). *See Williams* v. *Vincent*, 508 F.2d 541, 543-44 (2d Cir. 1974). *Cf. Nelson* v. *Heyne*, 491 F.2d 352, 356-57 (7th Cir.), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974) (use of tranquilizers

on boys in correctional school may amount to cruel and unusual punishment); *Mackey* v. *Procunier*, 477 F.2d 877 (9th Cir. 1973) (experiments with mind-altering drugs on prisoners in state mental facility is actionable under § 1983). The first part of plaintiffs' civil rights claim, the claim "belonging" to Blauer for his personal injuries, therefore states a proper § 1983 cause of action.

Blauer passed away without having had the opportunity to assert his civil rights claim. When a party dies before pursuing his cause of action under § 1983, the claim survives for the benefit of his estate if applicable state law creates a right of survival. *Brooks* v. *Flagg Bros., Inc.*, 553 F.2d 764, 768 n. 7 (2d Cir. 1977), *rev'd on other grounds*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). Under New York law the claim arising from the infringement of Blauer's civil rights survives his death and may be asserted by his personal representative. *See id.*; N.Y. E.P.T.L. § 11-3.2(b) (McKinney 1982). Blauer's personal representative would be Elizabeth Barrett, but only in her capacity as administratrix of her father's estate. *See* N.Y. E.P.T.L. § 1-2.13 (McKinney 1982). Thus, Barrett as administratrix has standing to assert this civil rights claim in her father's name for his personal injuries.

We turn now to the second part of plaintiffs' civil rights actions. In order to make out a valid § 1983 claim for their own injuries plaintiffs must demonstrate that: (1) the defendants subjected them to the deprivation of a federally protected right, (2) the defendants were acting under color of state law, and (3) plaintiffs are "persons" as that term is used in the statute with reference to injured parties. *See* 42 U.S.C. § 1983.

The deprivation which plaintiffs were allegedly subjected to was loss of property—the amount of compensation they would have received for Blauer's death had the true facts been known—without due process of law. This property would include the difference between the $18,000 received in settlement of the 1953 Court of Claims suit and the amount the estate would have received absent government concealment, plus the value of any other legal action (specifically, the FTCA suit) which might have been brought had the whole truth been known.[1] We must therefore first determine, regarding the FTCA action, whether statutory entitlement to a cause of action is a species of property protected by the Due Process Clause of the Fourteenth Amendment and, regarding the Court of Claims action, whether the full value of a lawsuit is property protected by the Due Process Clause.

In a recent unanimous Supreme Court opinion Justice Stevens noted that a cause of action for wrongful death created by state law is arguably a species of property protected by the Due Process Clause. *Martinez* v. *California,* 444 U.S. 277, 281-82, 100 S.Ct. 553, 557, 62 L.Ed. 2d 481 (1980). By analogy, plaintiffs' potential FTCA cause of action should be viewed as a protected property interest. Plaintiffs had a legitimate claim of entitlement created by federal law to bring such an action. *See Board of Regents* v. *Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Hence, plaintiffs had a federally protected right not to be deprived of

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[1] We express no opinion as to the value of either of these actions. Nor do we address the possibility that, if full compensation was awarded in one suit, the other suit would merely hold another party liable for the same sum.

their property interest in the FTCA action without due process. As discussed in Part I above, there is at least a factual issue as to whether defendants subjected them to a deprivation of this right.

Whether the true value of the Court of Claims action, something in excess of the $18,000 settlement, is a species of constitutionally protected property is somewhat less certain. In this instance, as distinguished from the FTCA situation, the cause of action itself against New York State was not concealed—Blauer's estate did sue and did receive some compensation. What plaintiffs are essentially claiming, however, is that the defendants' obstruction of justice in conducting a defense to that action deprived them, not of the whole of their constitutionally protected property consisting of the lawsuit, but only of a part of that protected property amounting to an increment in its value. Statutory or common law entitlement to be fully compensated through a lawsuit for one's injuries should be considered a species of property for the same reason that statutory entitlement to bring such a lawsuit at all is so considered. In other words, plaintiffs have a legitimate claim of entitlement to the "incremental" property in question which derives from the same state law that entitled them to the $18,000 settlement. Again, plaintffs present at least disputed factual issues as to whether the defendants deprived them of this federally protected right.[2]

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[2] Compare our earlier discussion of interference in the Court of Claims suit with *Hiney* v. *Wilson*, 520 F.2d 589 (2d Cir. 1975) (confiscation of legal papers is a cognizable civil rights claim) and *Sigafus* v. *Brown*, 416 F.2d 105 (7th Cir. 1969) (deprivation of papers needed for use in judicial proceeding constitutes denial of due process and may violate § 1983).

Turning to the second element of a § 1983 claim, the record is clear that the defendants were acting under color of state law in allegedly depriving plaintiffs of their just compensation. Aside from the general allegations of concealment by New York State medical personnel (*e.g.* ignoring the court order to produce certain documents), plaintiffs present evidence of concealment by the New York State Assistant Attorney General and the Court of Claims judge. In defending the 1953 Court of Claims action Assistant Attorney General Marcus, as discussed earlier, deliberately prevented the scheduling of depositions. Further, he secretly met *ex parte* with the trial judge prior to trial to tell him of the chemical warfare experiments, the United States Government's involvement and the necessity of concealing this information in the interest of national security. Consequently, when a hearing was later held to consider the settlement reached by the parties, false and misleading testimony and findings of fact were submitted to and accepted by the court. For example, Dr. Hoch testified that Blauer received a "commonly"-used, well-known, safe drug so that his condition "could best be diagnosed and treatment thereafter given." Later he refused to state categorically that he would have injected this mescaline derivative in the absence of the research contract. Additionally, plaintiffs submitted the affidavit of another expert in the field who attested that the records reveal no diagnostic or therapeutic purpose whatsoever for the injections administered to Blauer.

Finally, plaintiffs are injured parties who have standing to assert their own § 1983 claim. It is self-evident that Barrett in her individual capacity is a "person." *See* 42 U.S.C. § 1983. Barrett in her role as administra-

trix of the estate should also be considered an injured "person" for the purposes of § 1983. Corporations, because they are "associations of individuals united for a special purpose," have long been viewed as persons for due process purposes, *Pembina Consolidated Silver Mining and Milling Co.* v. *Pennsylvania,* 125 U.S. 181, 189, 8 S.Ct. 737, 741, 31 L.Ed. 650 (1888), and may be § 1983 plaintiffs, *see, e.g., Safeguard Mutual Insurance Co.* v. *Miller,* 472 F.2d 732, 733 (3d Cir. 1973) and cases cited therein. Unions and unincorporated associations have also been found to possess standing to assert a § 1983 claim. *Kennedy Park Homes Association* v. *City of Lackawanna, N.Y.,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971), (unincorporated association); *Elk Grove Firefighters Local No. 2340* v. *Willis,* 391 F.Supp. 487, 488-91 (N.D. Ill. 1975) (union). Similarly, the individuals represented by an estate administratrix are associated for a special purpose. These persons suffer when the estate, through its representative, is deprived of due process, just as the individuals comprising a corporation or a union suffer when the entity, through its representatives, is so deprived. We hold therefore that the administratrix of Blauer's estate has standing to sue for deprivation of the estate's right to due process.

III

We have established that plaintiffs theoretically may assert both parts of their § 1983 claim. Now we must determine whether they are barred by the statute of limitations. As the court below found, a three year limitations period is applicable to this civil rights action and fed-

eral law determines when the claim accrues. *Barrett*, 521 F.Supp. at 320. Under federal law a § 1983 claim accrues when the plaintiff " 'knows or has reason to know of the injury which is the basis of his action.' *Bireline* v. *Seagondollar*, 567 F.2d 260, 263 (4th Cir. 1977)." *Singleton* v. *City of New York*, 632 F.2d 185, 191 (2d Cir. 1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981).

The injury which is the basis of the first part of plaintiffs' civil rights action is Blauer's use as an unwitting test subject resulting in his suffering and death. The injury which forms the basis of the second part of plaintiffs' § 1983 claim is the deprivation of just compensation for Blauer's death owing to the alleged cover-up. In both instances, our previous discussion illustrates that plaintiffs have raised factual issues concerning whether or not they had reason to know of these injuries. Hence the issue of accrual under the Civil Rights Act, as under the FTCA, must await resolution of the disputed factual claims at trial.[8]

For the reasons outlined above the decision of the district court granting summary judgment is reversed and the case remanded for trial in accordance with this opinion.

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[8] In view of this holding we find it unnecessary to reach the question, discussed by the court below, of whether the equitable doctrine of fraudulent concealment acts to toll the § 1983 claims. *See Barrett*, 521 F.Supp. at 320-23.

Opinion and Order of Pierce, J., Southern District of New York, dated August 27, 1981

Elizabeth BARRETT,

Plaintiff,

v

Martin HOFFMAN, et al.,

Defendants.

Elizabeth BARRETT,

Plaintiff,

v

UNITED STATES of America, et al.,

Defendants.

Elizabeth BARRETT,

Plaintiff,

v

Frank M. ARTHUR, et al.,

Defendants.

Nos. 76 Civ. 381 (LWP), 76 Civ. 1061 (LWP) and 78 Civ. 3762 (LWP).

United States District Court,
S. D. New York

Aug. 27, 1981.

Richard P. Schifter, Arnold & Porter, Washington, D.C., Herbert K. Lippman, New York City, for plaintiffs.

Opinion and Order of Pierce, J., Southern District of New York, dated August 27, 1981

John S. Martin, Jr., U.S. Atty., S. D. N. Y. New York City by Susan M. Campbell, John M. O'Connor, Asst. U.S. Attys., New York City, for the United States and Federal defendants.

Michael Futterman, Bower & Gardner, New York City, for defendant James P. Cattell.

Frederick H. Block, New York City, for defendant David Marcus.

Paul L. Pileckas, Pileckas & Pileckas, Rome, N.Y., for defendant Newton Bigelow.

OPINION AND ORDER

Pierce, District Judge.

These actions arise from the tragic death of Harold Blauer on January 8, 1953 at the New York State Psychiatric Institute ("the Institute"). The 42 year old Blauer had been voluntarily admitted to the Institute for psychiatric treatment following shock therapy at Bellevue Hospital. Shortly after his death Blauer's ex-wife commenced an action on behalf of the Estate against the State of New York in the New York State Court of Claims for wrongful death and negligence in administering to Blauer injections of allegedly toxic substances. The Estate settled the claims against the State in 1955 for $18,000.

Reasserting claims similar to those stated in the former state action, the complaints herein allege that while Blauer

was a patient at the Institute he was involuntarily treated with unknown drugs "solely for experimental purposes, without any proper diagnostic or therapeutic purposes thereof and without proper information as to the nature, composition and effects of those drugs." (*Barrett* v. *Hoffman*, Complaint ¶ 33). An additional allegation is made that the drugs were supplied to the Institute pursuant to "a 1951 secret contract" between the Chemical Corps Procurement Agency of the Department of the Army and the New York State Psychiatric Institute (*Barrett* v. *Hoffman*, Complaint ¶ 44)[1] and were given to Blauer "solely to test their efficacy as chemical warfare weapons." (Plaintiffs' Rule 9(g) Statement). The gravamen of plaintiffs'[2] present claim in the current three civil rights actions is that salient facts surrounding Harold Blauer's death were withheld from the Estate at the time of the settlement in the state court action. Defendants move to dismiss the complaints herein based upon a variety of legal theories. For the reasons discussed below, the motions are granted on the grounds that actions are time barred.

INTRODUCTION

It is not disputed that the federal government, the Institute and their representatives secretly conducted drug tests on Blauer. Nor is it disputed that the Estate was repre-

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[1] Similar allegations are made in each of the companion cases. *See Barrett* v. *United States*, ¶¶ 19 and 22; *Barrett* v. *Arthur*, ¶¶ 19 and 27.

[2] As used herein plaintiff in the singular refers to Elizabeth Barrett; plaintiffs refers to Elizabeth Barrett individually and as Administratrix of the Estate of Harold Blauer.

sented by counsel[3] and settled its claims with incomplete knowledge of the full panoply of facts surrounding the decedent's death. At issue here is whether decedent's Estate, injured by grossly offensive acts of government may obtain additional redress in federal court a quarter of a century after the injuries were sustained, based upon relatively recent revelations by the federal government of its involvement in the events which led to Blauer's death.

After careful consideration of the facts and history of plaintiffs' claims, and of the applicable law, the Court concludes that these actions are time-barred by the relevant statutes of limitations and that these bars cannot be lifted by application of equitable tolling principles. Although the Court holds for defendants herein on the affirmative defense asserted, the Court's decision should not be construed as countenancing the government's actions in testing drugs on human subjects or in failing to timely reveal the full extent of its involvement in Blauer's death. As discussed hereinbelow, the failure of plaintiff's predecessor to timely and diligently press her rights in the prior action leads this Court to conclude that the current suits present no legally cognizable claim for relief in the federal courts.[4]

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[3] Amy Blauer was originally represented by the law firm of Kaye, Scholer, Fierman and Hayes. On June 21, 1954, during the course of the State Court of Claims litigation, Blauer replaced the Kaye, Scholer firm with the law firm of O'Dwyer & Bernstein.

[4] It is by now a fundamental precept that federal courts are courts of limited jurisdiction with authority to adjudicate specific

(Footnote continued on following page)

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Before turning to the issues presented herein, a review of the history of this controversy is warranted.

FACTS

Harold Blauer was survived by his daughters, Belinda and Elizabeth (the plaintiff herein), and by his ex-wife, Amy Blauer. The Blauers had been divorced in August of 1952. Soon after Harold Blauer's death, Amy Blauer retained an attorney from a large Manhattan law firm to investigate her ex-husband's death and to take appropriate legal action. The autopsy report which the firm obtained revealed the cause of death to be: "Coronary arteriosclerosis; sudden death after intravenous injection of a mescaline derivative, January 8, 1953." Members of the firm also interviewed Mrs. Blauer, obtained copies of the death certificate, and contacted at least one physician to discuss the drug mescaline.

Thereafter, on April 2, 1953, Amy Blauer, acting as Administratrix of the Estate of Harold Blauer, commenced an action against the State of New York in the New York State Court of Claims. The complaint charged:

(Footnote continued from preceding page)

controversies between adverse litigants within the parameters of the Constitution, Acts of Congress and case law. Even where federal subject matter jurisdiction may properly be found, defenses available to the parties—statutes of limitations, res judicata, defects in service, etc.—can further operate to limit the Court's power to adjudicate the merits of a dispute. Adherence to such limitations on the Court's powers is essential to continued and predictable administration of justice.

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> "The State of New York, by its agents, servants or employees, negligently, carelessly and improperly caused and permitted a substance to be administered to said decedent by injection; that although the State of New York prior to such date, administered such substance to decedent by injection and although, on such prior occasions, said decedent had reacted adversely and was made violently ill from the effects thereof and although the State of New York had knowledge of such adverse reaction and violent illness on the part of the decedent, it nevertheless negligently, carelessly and improperly administered said substance on the date in question to decedent; that the said substance so administered by the State of New York as aforesaid to decedent was toxic and dangerous; that The State of New York negligently, carelessly and improperly caused and permitted the same to be so administered by an inexperienced, incompetent and improper person; that The State of New York negligently, carelessly and improperly caused and permitted an overdose of the same to be so administered to decedent; that The State of New York, after the administration of said substance as aforesaid, and upon the said decedent thereupon reacting adversely, further negligently and carelessly failed to apply the proper remedies to revive decedent from the effects of said substance so administered to decedent."
>
> (Ct. of Claims Complaint ¶ 13)

The complaint further charged: "[A]s a result of the foregoing said decedent died on January 3, 1953." (Ct. of

Claims Complaint ¶ 14). The Estate commenced no action against either the physicians at the Institute or the Institute itself.

By Order dated January 4, 1954 Judge George Sylvester of the New York State Court of Claims granted the Estate's motion "for inspection of the records pertaining to Harold Blauer . . ." and for an examination of Drs. G. Schnack and James Cattell, the treating physicians. By the terms of that order relevant records were to be produced, and the Doctors examined at the Institute on January 12, 1954. Plaintiffs aver that this order was "apparently deliberately ignored." (*Barrett* v. *Hoffman* Complaint ¶ 40).

On May 17, 1955, with benefit of counsel but apparently without having pursued discovery from the defendant, Amy Blauer settled the Estate's claim against the State of New York for the sum of $18,000 and executed a general release. The settlement and release were approved after a two-day hearing in May of 1955 before Judge Fred A. Young of the New York State Court of Claims. The transcript of that hearing has been submitted by several of the parties herein. During that hearing Mrs. Blauer testified that she was aware that the hospital had administered a course of drug treatment for the purpose of making drug studies of her ex-husband's mental condition to which he had reacted negatively. She also revealed that to the best of her knowledge Harold Blauer had never suffered from a coronary condition. Mrs. Blauer indicated that she was accepting the settlement without duress or pressure and that she understood that the settlement sum of $18,000 would be the only award she would receive on her claim.

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Testimony was also received during the State Court of Claims hearings from Dr. Paul Hoch, the principal research psychiatrist at the Institute. Hoch testified that Blauer was injected with drugs as a part of a chemical therapy research project, that the drug study did not comport with standards acceptable in clinical practice at the time, and that Blauer had died directly as a result of the injection of the drug. Dr. Hoch was only questioned by David Marcus, Assistant Attorney General for the State of New York; Amy Blauer's attorney conducted no examination.

Proposed findings of fact and conclusions of law were apparently submitted by Marcus with the acquiescence of Amy Blauer's attorney. Marcus emphasized on the record that, if the Court approved the settlement, the releases to be executed ran to "the State of New York, the New York Psychiatric Institute and all the doctors, agents and employees thereof; and to the organization, group, governmental body or agency which furnished the drugs used in the drug study which resulted in the death of Harold Blauer." The release executed by Amy Blauer on May 17, 1955 contained similar language.[5]

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[5] The release stated in relevant part that ". . . AMY BLAUER, as Administratrix of the Goods, Chattels and Credits of HAROLD BLAUER, . . . in consideration of the sum of EIGHTEEN THOUSAND ($18,000.00/100) DOLLARS . . . paid by The State of New York, New York State Psychiatric Institute, all doctors, agents and employees thereof and the organization, group, governmental body or agency which furnished the drug used in the drug studies which resulted in the death of HAROLD

(Footnote continued on following page)

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Twenty years later, in August of 1975, approximately one year after Amy Blauer's death, the Secretary of the Army issued a press release announcing the discovery of a file revealing the death of a 42 year old male civilian during the course of chemical compound test programs administered by the Army to determine the clinical effects of psychochemical agents on the psychiatric behavior of human subjects. Harold Blauer was that male civilian.

From the Army file Elizabeth Barrett, Blauer's daughter, allegedly discovered that the State of New York and the federal government had reached an agreement in 1954 whereby the United States would pay half of any settlement agreement reached by the State of New York in the Blauer State Court of Claims action if the purpose and role of the federal government in providing the drugs were not revealed.[6] It is undipsuted that the federal gov-

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BLAUER . . . remise, release, and forever discharge . . . the said State of New York, New York State Psychiatric Institute, all doctors, agents and employees thereof and the organization, group, governmental body or agency which furnished the drug used in the drug studies which resulted in the death of HAROLD BLAUER . . . from all and all manner of action and actions, cause and causes of action, suits, debts, dues . . . which against them I ever had, now have or which I or my heirs executors, or administrators, hereafter can, shall or may have . . ." (Exh. JJ, Def. Cattell's Motion to Dismiss).

[6] Prior to the New York State Court of Claims settlement hearing David Marcus, the Assistant Attorney General representing the State, revealed to Judge Young in an ex parte chambers conference the involvement of the United States government in supplying the drugs administered to Harold Blauer and the classified status of many of the documents involved in the action.

ernment paid $9,000 of the $18,000 settlement amount received by the Estate.

In September 1975, Elizabeth Barrett, filed an administrative claim with the United States pursuant to the requirements of the Federal Tort Claims Act (28 U.S.C. § 2675) alleging negligence by employees of the federal government in the death of Harold Blauer. The United States made no determination of the merits of the claim. Late in 1975, Elizabeth Barrett instituted an additional proceeding in the New York State Court of Claims to grant discovery and inspection prior to commencing an action. (NYCPLR § 3102(c)). On January 9, 1976 the Court of Claims denied her application for discovery and held that the 1955 settlement and judgment in the State Court of Claims barred further claims in that Court arising from the death of Harold Blauer. Referring to the circumstances surrounding the earlier settlement, the Court noted: "[I]t is apparent to the Court that the Claimant had sufficient information to pursue her claim. The only thing that the Claimant in that action did not have was information pertaining to the involvement of the United States government, through the Department of the Army. The Court must properly question what difference this information would have had with regard to that claim." *Barrett* v. *New York*, 85 Misc. 2d 456, 461, 378 N.Y.S.2d 946, 951 (Ct.Cl. 1976).

On January 22, 1976 having failed to obtain the relief she sought in the State Court of Claims, Elizabeth Barrett, individually, commenced an action in this Court pursuant to 42 U.S.C. §§ 1983, 1985(3) and 1986 and the Fifth, Ninth

and Fourteenth Amendments.[7] The complaint charged that defendants——officials of the Department of the Army and the Department of Justice, and physicians at the Institute —conspired "to conduct a wide-scale experimental drug program upon human subjects" (Complaint ¶ 32) and "to cover up the existence of the aforementioned wide-scale experimental drug program upon human subjects (Complaint ¶ 34) and "to inflict cruel and unusual punishment upon Blauer . . . and to deprive plaintiff, Blauer and others of life, liberty and property without due process of law and of the equal protection of the laws." (Complaint ¶ 36).

On March 4, 1976 Elizabeth Barrett, individually and as Administratrix of the Estate of Harold Blauer, commenced an action against the United States of America, the Institute, the State of New York and several named state officials and doctors at the Institute.[8] Predicating her claims

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[7] *Barrett* v. *Hoffman,* et al., 76 Civ. 381. The sole claim now pressed in this action is deprivation of constitutional rights in violation of 42 U.S.C. § 1983. *See* Opinions and Orders of this Court dated March 30, 1976 and September 8, 1976. The defendants remaining in this action are: David Marcus, the Assistant Attorney General who represented the State of New York in the State Court of Claims action in 1953; Van Sim, a physician employed by the Department of the Army; George Leonard, an employee of the Department of Justice; Newton Bigelow, who was Commissioner of the New York State Department of Mental Hygiene; James Cattell, a physician employed by the State of New York who treated Blauer at the Institute; the Estate of Amadeo Marrazzi who was the Chief of the Clinical Research Division, Chemical Corps Medical Laboratories of the Department of the Army; William Creasey, a General in the Department of the Army; John Derrick, Harris North and Herbert Greer, Colonels in the Department of the Army.

[8] *Barrett* v. *United States, et al.,* 76 Civ. 1061. Only the United States government remains a defendant in this action. *See* Opinions and Orders of this Court dated October 26, 1976 and March 17, 1977.

for relief on the Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671, *et seq.*) and principles of pendent jurisdiction, Barrett charged that defendants wrongfully administered drugs to Blauer without his consent "solely for experimental purposes" which resulted in his enduring "pain, suffering, . . . inconvenience . . . [and] death." (Complaint ¶¶ 19, 20). The complaint also alleged that the drugs were administered as a part of a secret contract between the Army and the Institute, the existence of which Amy Blauer was unaware when she instituted her action in the New York State Court of Claims in 1953. (Complaint ¶¶ 22-24).

On August 14, 1978 Elizabeth Barrett, individually and as Administratrix of the Estate of Harold Blauer, commenced a third action in this Court against officials of the Department of Justice, the Department of the Army and the Institute.[9] The averments of the complaint, brought pursuant to 42 U.S.C. § 1983 and the Fifth, Ninth and Fourteenth Amendments to the Constitution, were virtually identical to those set forth in *Barrett* v. *Hoffman*, 76 Civ. 381.

The defendants in each of these actions moved to dismiss based upon a variety of legal theories including, *inter alia*, failure to state a claim, lack of personal jurisdiction, immunity, statute of limitations and res judicata. (*See*, Opinion and Orders of this Court dated, March 30, 1976, September 8, 1976, October 26, 1976, March 15, 1977, and March 18, 1980). By Orders dated March 30, 1976 and March 15,

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[9] *Barrett* v. *Arthur, et al.*, 78 Civ. 3762. Frederick Lough, legal advisor to the Chief Chemical Officer of the Army, is the sole remaining defendant in this action.

1977, this Court stayed determination of defendants' motions to dismiss on grounds of res judicata, release, and statute of limitations and authorized limited discovery on these issues.

Having proceeded with discovery under the supervision of Magistrate Harold Raby for approximately four years, the parties in these actions have submitted to the Court voluminous records including, *inter alia,* copies of Harold Blauer's hospital records, memoranda from the files of Amy Blauer's former attorneys regarding the State Court of Claims litigation commenced in 1953, and several formerly classified government documents, regarding the experimental drug testing in which Blauer was allegedly involved.

Under these circumstances where the Court has been presented with submissions and documents which are outside the pleadings, the motions to dismiss herein are considered to be motions for summary judgment pursuant to Fed.R.Civ.P. 56. Construing the pleadings and evidentiary submissions of the parties in the light most favorable to the plaintiffs, *Hill* v. *A-T-O, Inc.,* 535 F.2d 1349 (2d Cir. 1976), the Court concludes that there are no genuine issues of material fact which must be determined at trial relevant to the issue of when plaintiffs' cause of action accrued. The Court concludes that the cause of action herein accrued not later than May of 1955 when plaintiff's mother, acting on behalf of the Estate, knew of the injury and the cause of the injury which Harold Blauer sustained. The § 1983 actions herein were not commenced until 1976 and 1978 and no claim under the Federal Tort Claims Act was made to the United States Government until 1975. Therefore, as

discussed hereinbelow under the applicable statute of limitations the claims of the plaintiffs are time barred.[10]

CONSTITUTIONAL CLAIMS

Before turning to the statute of limitations issues, it is necessary to set forth with particularity the parameters of the constitutional claims for which plaintiffs seek redress under § 1983.

It is by now axiomatic that a plaintiff asserting a cause of action under § 1983 must demonstrate that she has been deprived of a right, privilege or immunity secured by the constitution and laws of the United States. *Paul* v. *Davis*, 424 U.S. 693, 700, 96 S.Ct. 1155, 1160, 47 L.Ed. 2d 405 (1976); *Kletschka* v. *Driver*, 411 F.2d 436, 447 (2d Cir. 1969). This Court has previously held that the charge that Harold Blauer was involuntarily injected with dangerous drugs in furtherance of a federal program for testing chemical weapons and the claims of a conspiracy stemming therefrom stated a claim of constitutional dimension. (*See* Opinion and Order, *Barrett* v. *Hoffman*, 76 Civ. 381, September 9, 1976).

However, the gravamen of the plaintiffs' § 1983 claim as set forth in the submissions in opposition to defendants' motions *now* appears to be that the defendants' alleged conspiracy to withhold from Harold Blauer's

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[10] In light of the holding herein that plaintiffs' claims are time barred, the Court need not address the issue of whether the claims are barred by principles of res judicata and estoppel arising from Amy Blauer's settlement and release in 1955 and the action of the New York State Court of Claims in 1976.

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Estate various facts necessary to a fair settlement of the Estate's claims arising from Blauer's death deprived the Estate of property without due process. (Plaintiffs' Sur-reply Memorandum, dated October 27, 1980 at 31). By focusing upon the due process violations allegedly sustained by the Estate after Harold Blauer's death rather than upon the injuries the decedent allegedly sustained from the drug testing prior to his death, the plaintiffs have significantly altered the constitutional claim being pressed in this litigation. In its Opinion and Order of September 9, 1976 this Court expressly declined to decide whether the Estate of Harold Blauer or Elizabeth Barrett could claim deprivations of constitutional rights arising *solely* from the defendants' conduct in the alleged conspiracy to withhold from the Estate the information regarding the events surrounding Blauer's death.

The Court rejects plaintiffs' novel view of the due process obligations to be imposed upon the government in civil litigation. Plaintiffs seek to convert the equitable defense of fraudulent concealment—generally asserted as a justification for tolling the statute of limitations (*see* p. 320 *infra*)—into a cause of action for deprivation of due process merely because the alleged concealing person is a government agency or officer. As far as this Court is aware, the due process requirements of the Fifth and Fourteenth Amendments have not yet been so expansively construed in civil litigation in which the government simply happens to be a party. Adoption by this Court of the rule espoused by the plaintiff would place upon the government in civil litigation a unique "duty to disclose", and would transmute a failure to disclose into a due process violation. The Court declines to impose such

a *sui generis* burden. In the absence of a fiduciary relationship, there is no duty imposed upon a party—governmental or nongovernmental—to voluntarily disclose evidence or a cause of action in a civil suit. *Hauben* v. *Harmon*, 605 F.2d 920, 924 (5th Cir. 1979).[11] Within the context of civil litigation, the discovery rules and sanctions of the Federal Rules of Civil Procedure apply to agencies of the government in the same manner that they apply to any other litigant. *Amchem Products, Inc.* v. *GAF Corp.*, 64 F.R.D. 550 (D.Ga. 1974); *NAACP Western Region* v. *Hodgson*, 57 F.R.D. 81 (D.D.C. 1972). The sanctions available under Fed.R.Civ.P. 37 for failure to comply with discovery requests may be imposed upon governmental agencies. *Kahn* v. *Sec. of Health, Education and Welfare*, 53 F.R.D. 241 (D.Mass. 1971). Thus, the Court concludes that the government stands equal before the law with any civil litigant subject to the same rules of discovery, Wright and Miller, *Federal Practice & Procedure*, § 3652, n. 1; it should have no added burden to voluntarily disclose information relevant to an opponent's cause of action, particularly when, as here, there has been a failure by the adverse party to diligently utilize available procedures in an effort to ascertain such information.

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[11] Compare the limited duty to disclose evidence imposed upon the government in a criminal context. *United States* v. *Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *United States* v. *Shelton*, 588 F.2d 1242 (9th Cir. 1978); *United States* v. *Sherman*, 426 F.Supp. 85, 90 (S.D.N.Y. 1976); Fed. R.Crim. P. 16; *People* v. *Jones*, 44 N.Y.2d 76, 404 N.Y.S.2d 85, 375 N.E.2d 41 (1978).

Accordingly, the Court finds that the alleged fraudulent concealment by government officials herein, *pressed on behalf of the Estate and Barrett individually* as a deprivation of property without due process, does not give rise to a cause of action for deprivation of constitutional rights under § 1983.[12] The sole cognizable *constitutional* claim herein arises from the treatment of Harold Blauer prior to his death.

STATUTE OF LIMITATIONS.

A. *The Federal Tort Claims Act*

The plaintiffs' claims against the United States under the Federal Tort Claims Act rest upon the alleged tortious negligence of the federal government in administering and supervising the program which dispensed the drugs which caused Harold Blauer's death. The defendant United States moves to dismiss the claims as time barred.

The Act provides that a "tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal Agency within two years after such claim accrues . . ." (28 U.S.C. § 2401(b)). Because the Act is a waiver of sovereign immunity the limitation period must be strictly construed and exceptions thereto are not to be implied. *United States* v.

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[12] The Court need not address the scope of the due process rights of an Estate and whether an Estate suing on its own behalf for alleged violations of its due process rights is a "person" within the meaning of § 1983.

Kubrick, 444 U.S. 111, 114, 100 S.Ct. 352, 355, 62 L.Ed. 2d 259 (1979); *Peck* v. *United States,* 470 F.Supp. 1003, 1018 (S.D.N.Y. 1979). The plaintiff filed an administrative claim with the United States alleging negligence by employees of the federal government in the January 8, 1953 death of Harold Blauer. This administrative claim was filed September 1975 and, thus, if the cause of action herein accrued more than two years prior to this date, the action would be time barred under § 2401(b).

The central issue raised by this motion is when the plaintiffs' cause of action accrued. The question of when a claim against the United States "accrues" within the meaning of § 2401(b) is addressed in neither the legislation nor in the pertinent legislative reports. *Lee* v. *United States,* 485 F.Supp. 883, 886 (E.D.N.Y. 1980). The accrual date is, however, determined by federal law. *Steele* v. *United States,* 559 F.2d 823, 826 (7th Cir. 1979); *Kossick* v. *United States,* 330 F.2d 933, 935 (2d Cir.), *cert. denied,* 379 U.S. 837, 85 S.Ct. 73, 13 L.Ed.2d 44 (1964).

Ordinarily, a cause of action accrues when the tort is complete, i. e., when there has been an invasion of a legally protected interest of the plaintiff. Restatement (Second) of Torts § 899, comment c (1977). In actions charging negligence, such as is alleged here, accrual occurs when the harm or injury is inflicted. *Steele* v. *United States, supra* at 827; *Camire* v. *United States,* 489 F.Supp. 998, 1001 (N.D.N.Y. 1980); *Lee* v. *United States, supra; Developments in the Law—Statutes of Limitations,* 63 Harv.L.Rev. 1177, 1201 (1950). Using the traditional standard, i. e., when the injury occurred, plaintiffs' cause of action would have accrued when Blauer died in 1953 and this action clearly would be time-barred.

Opinion and Order of Pierce, J., Southern District of New York, dated August 27, 1981

The general rule that a cause of action accrues when the injury is inflicted has been liberalized in a few narrowly defined instances, particularly in the area of medical malpractice, to permit accrual when the injury is discovered. *See United States* v. *Kubrick, supra,* 444 U.S. at 113, 100 S.Ct. at 355; *Urie* v. *Thompson,* 337 U.S. 163, 170, 69 S.Ct. 1018, 1024, 93 L.Ed 1282 (1949) (cause of action does not accrue if plaintiff is ignorant of a condition or injury which is "unknown" or 'inherently unknowable"). Use of this so-called "discovery rule" [i. e., determining that a cause of action accrues upon discovery of the injury not when the injury actually occurs], arguably applicable only in the malpractice area, *Steele* v. *United States, supra* at 828; *Kington* v. *United States,* 396 F.2d 9 (6th Cir.), *cert. denied,* 393 U.S. 960, 89 S.Ct. 396, 21 L.Ed.2d 373 (1968); *Wollman* v. *Gross,* 484 F.Supp. 598, 603 (D.S.D. 1980), has been expanded to encompass situations where the consequences or fact of an injury is latent and therefore unnoticed until after the limitations period has expired. *See Stoleson* v. *United States,* 629 F.2d 1265, 1269 (7th Cir. 1980); *Liuzzo* v. *United States,* 485 F.Supp. 1274, 1280 (E.D.Mich. 1980). The Seventh Circuit has expressed the view that "any plaintiff who is *blamelessly ignorant* of the *existence or cause of his injury* shall be afforded the benefits of the discovery rule." *Stoleson* v. *United States, supra* at 1269. (emphasis added) From the facts set forth hereinbelow it appears that plaintiffs were not blamelessly ignorant of the existence of the injury to Harold Blauer or its cause. Without resort to "the discovery rule," the

cause of action would have accrued on January 8, 1953 when Blauer died and the alleged conspiracy commenced.[13]

However, application of "the discovery rule" in this case would merely postpone the accrual of the cause of action from January 1953 when Blauer died, until, at the latest, May of 1955 when the Estate discovered facts sufficient to trigger the running of the limitations period. Under either analysis, therefore, the action is time barred. Nonetheless, the Court will analyze the facts herein from the more liberal vantage point of "the discovery rule."

In *United States* v. *Kubrick, supra,* a medical malpractice action, the Supreme Court recently discussed the level of knowledge or facts about which a plaintiff must be aware in order for his cause of action to accrue under the Federal Tort Claims Act. In *Kubrick, supra* 444 U.S. at 113, 100 S.Ct. at 355, the Court addressed the issue of "whether [a] claim 'accrues' within the [Federal Tort Claims] Act when the plaintiff knows of both the existence and the cause of his injury or a later time when he also knows that the acts inflicting the injury may constitute malpractice." Adopting the former accrual date, the Court

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[13] The crucial time for accrual purposes when conspiracy is alleged is when the plaintiff becomes aware that she is suffering from a wrong for which damages may be recovered in a civil action. *Singleton* v. *City of New York,* 632 F.2d 185, 192-93 (2d Cir. 1980), *cert. denied,* 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981). The existence of the conspiracy itself does not postpone the accrual of a cause of action arising from the conspirators' separate wrongs. "It is the wrongful act, not the conspiracy, which is actionable, whether that act is labelled a tort or a violation of § 1983. *Korry* v. *International Telephone & Telegraph Co.,* 444 F.Supp. 193 (S.D.N.Y. 1978)." *Id.*

held that the malpractice claim of a patient in a Veteran's Hospital, who was injected with an antibiotic and subsequently suffered a hearing loss, accrued when a physician told him that it was highly possible that his hearing loss resulted from the administration of the antibiotic, not when he was told several years later that the drug had caused his injury and should not have been administered. Thus, *Kubrick* holds that a cause of action accrues when a plaintiff is aware of the fact of his injury and its cause.

While formulations of the requisite level of knowledge under *Kubrick* vary considerably, knowledge of the fact of injury and the cause of injury are clearly critical.[14]

The rationale underlying the postponement of accrual until the plaintiff learns of both his injury and its cause rests upon the recognition that the injury itself may be latent and that the "facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *United States* v.

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[14] *See Lee* v. *United States*, 485 F.Supp. 883, 886 (E.D.N.Y. 1980) ("whether a 'reasonably diligent' claimant *knows enough so that he 'can protect himself by seeking advice in the medical and legal community.'*"); *Peck* v. *United States*, 470 F.Supp. 1003, 1018 (S.D.N.Y. 1979) ("when the plaintiff in the exercise of due diligence knew or should have known the *facts giving rise to his cause of action*"); *Schnurman* v. *United States*, 490 F. Supp. 429, 435 (E.D.Va. 1980) (when plaintiff is "in possession of *critical facts concerning his injury* and *its alleged cause*"); *Liuzzo* v. *United States*, 485 F.Supp. 1274, 1281 (E.D. Mich. 1980) ("when the plaintiff had knowledge of the 'critical facts' regarding his injury.") *Dessi* v. *United States*, 489 F.Supp. 722, 724 (E.D.Va. 1980) ("when the plaintiff knows, or in the exercise of reasonable diligence, should have known *both the existence and cause of his injury.*" (Emphasis added).

Kubrick, supra 444 U.S .at 122, 100 S.Ct. at 359; *Liuzzo* v. *United States, supra* at 1281. Once in control of the critical facts of injury and causation the injured party has sufficient information upon which to conduct an investigation of the merits of his claims. *United States* v. *Kubrick, supra.* In short, a cause of action against the government accrues under the Federal Tort Claims Act when a reasonably diligent plaintiff knows enough of the critical facts of injury and causation to protect himself by seeking advice in the medical and legal community. *Lee* v. *United States, supra* at 886; *Dessi* v. *United States,* 489 F.Supp. 722 (E.D.Va. 1980).

Amy Blauer sought assistance in the legal community in 1953, less than three months after the death of her ex-husband. Nonetheless, plaintiff Elizabeth Barrett now contends that while the Estate was aware of the fact of ultimate injury to Harold Blauer—his death—it was unaware of the "cause" of Blauer's death—that the drugs were responsible for his death, that they were supplied by the United States government, or that they were administered without Blauer's permission as a part of a program for the testing of chemicals to be used by the Department of the Army.

As used in *Kubrick* the phrase "cause of the injuries" is unclear. The patient in *Kubrick* was aware that the Veteran's Administration doctors had administered the antibiotic. Hence, there was no need for the Court to address the "who" element of causation. Since the patient in *Kubrick* was allegedly unaware of "what" had precipitated his deafness, the Court focused its analysis on this element of causation and discussed the degree of notice sufficient to commence the running of the statute of limitations when

knowledge regarding what caused a plaintiff's injuries is unavailable.

Elizabeth Barrett here asserts that her mother and the Estate were unaware of *both* the "what" and the "who" ingredients of causation. Hence, it is incumbent upon the Court to inquire as to the level and scope of the plaintiffs' knowledge of the circumstances surrounding the death of Harold Blauer, and whether such knowledge was *legally* sufficient to commence the running the statute of limitations.

Initially, the Court rejects as "fanciful" the plaintiffs' claim that the Estate was unaware of "what" had caused Blauer's death. *See Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). The Medical Examiner listed the cause of death on the 1953 autopsy report as: "Congestion of the Viscera; coronary arteriosclerosis; Sudden death after intravenous injection of a mescaline derivative, January 8, 1953." (Exh. 11, Plaintiffs' Motion for Reargument). The Estate does not deny that it had access to the autopsy report which described the death and revealed that it had occurred within two hours of an injection of a mescaline derivative. Indeed, in the complaint filed in the New York State Court of Claims, Amy Blauer charged that the decedent was negligently injected with a toxic substance which made him ill and resulted in his death. (*See* pp. 310-311 *supra*). The files of Amy Blauer's attorneys are replete with references to the drug. An office memo dated March 18, 1953 from the firm which initially represented Amy Blauer concludes: ". . . Fierman could not find out anything about the drug . . . it seemed to be an experimental drug . . . She [Amy Blauer] heard talk of 'overdose' . . ." (Exh. N, Def. Cattell's Motion

to Dismiss). Another office memo dated March 13, 1953 details conversations between a member of the firm and Dr. Louis Winkelman regarding the Blauer death and the drug mescaline. (Exh. W, Def. Cattell's Motion to Dismiss). At the State Court of Claims settlement hearing on May 17, 1955, Dr. Paul Hoch testified that Harold Blauer "died directly as a result of the injection of drugs into his body." Finally, Amy Blauer's petition to the Surrogate of Nassau County dated April 30, 1956 stated "[t]hat on January 8, 1953, while decedent was a patient at the New York State Psychiatric Institute, a drug was administered which resulted in his death." (Exh. B Fed. Defs. 9g Statement). Drawing every inference favorable to the plaintiffs these documents demonstrate that the Estate was aware of "what" had caused Blauer's death.[15]

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[15] The Court reaches this conclusion despite the plaintiffs' attempt to create a disputed issue of material fact on this question through the affidavit of Michael M. Baden, Deputy Chief Medical Examiner of the City of New York. (Appendix A, Plaintiffs' Memorandum in Reply to Motion to Dismiss). Focusing on the facts allegedly omitted by the New York State Psychiatric Institute in the report sent to the Medical Examiner's Office in 1953, Baden concludes that the cause of death was improperly reported on the autopsy report as "coronary ar[illegible]riosclerosis." The autopsy report's reference to "Sudden death after intravaneous injection of a mescaline derivative, January 8, 1953" is said by Baden to indicate "a temporal association between the death and the drug," not a causal relationship. From this affidavit the Court is asked to conclude that the Blauer Estate could not have been aware that the mescaline drugs administered to decedent at the Institute caused his death. This conclusion is belied by the language of Amy Blauer's complaint in the New

(Footnote continued on following page)

Turning to the "who" component of causation, the Estate knew that the State of New York which operated the Institute was responsible for Blauer's death. Moreover, the Estate also knew that Doctors Hoch, Cattell and Schnack were involved in Blauer's treatment. However, it was unaware of the roles played by the Department of the Army and the United States goverment.

Yet, lack of knowledge of the identity or status of *all* tortfeasors does not defer accrual of a cause of action, particularly where the identity of at least one such tortfeasor is known. Federal precedent supports the proposition that a plaintiff's ignorance of the identity of a tortfeasor will not excuse a delay of more than two years in pressing a tort claim against the government. *Wollman* v. *Gross*, 637 F.2d 544, 551 (8th Cir. 1980); *West* v. *United States*, 592 F.2d 487, 492 (8th Cir. 1979); *Steele* v. *United States*, 559 F.2d 823, 826 (7th Cir. 1979); *Lien* v. *Beehner*, 453 F.Supp. 604, 608 (N.D.N.Y. 1978); *Baker* v. *United States*, 341 F. Supp. 494 (D.Md. 1972); *Driggers* v. *United States*, 309 F.Supp. 1377, 1379 (D.S.C. 1970). Thus, in *Steele* v. *United States, supra*, the federal tort claim against the Federal Aviation Administration was found to accrue at the time of plaintiff's injury despite the fact that he was wholly unaware at that time that the United States government

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(Footnote continued from preceding page)

York State Court of Claims, the references to the drug in the files of Amy Blauer's attorney, the testimony of Dr. Paul Hoch at the settlement hearing on May 17, 1955, and Amy Blauer's petition to the Surrogate of Nassau County in April 1956. In short, Baden's affidavit relying solely on the death certificate overlooks other information available to the Court.

was the third party allegedly negligent in failing to warn of the remote power switch which caused his injuries.

Barrett points to a single district court decision, *Liuzzo* v. *United States, supra,* in support of the proposition that a plaintiff's ignorance of the identity of one tortfeasor can delay the accrual of a cause of action under the Federal Tort Claims Act. While not binding upon this Court, the holding in *Liuzzo* does not suggest a different result herein. In *Liuzzo* the children of a slain civil rights worker commenced an action under the Federal Tort Claims Act alleging that the F.B.I. was responsible for their mother's death. Mrs. Liuzzo was killed in 1965 apparently by four members of the Ku Klux Klan who were subsequently apprehended. One of the assailants, Rowe, surfaced as a paid F.B.I. informant; his testimony was critical in convicting the other three of federal charges. Rowe testified that he had been aware that the murder was planned but had been powerless to prevent it. In late 1975 and early 1976 Rowe revealed for the first time that he had participated in acts of violence which were known to, and sanctioned by, the F.B.I. The Court ruled that the family's federal tort claim against ths F.B.I. filed in October 1977 was not untimely. It is noteworthy that no civil action or inquiry had been commenced by decedent's family or Estate prior to October 1977.

The Court in *Liuzzo* held that "a cause of action accrues at the earliest point at which a plaintiff has knowledge of the critical facts surrounding his injury such that an investigation is both warranted and realistically possible." *Id.* at 1283. Unlike the *Liuzzo* plaintiffs, the Blauer Estate had sufficient knowledge of the critical facts sur-

rounding Blauer's death to commence both an investigation and a lawsuit in the New York State Court of Claims as early as 1953. Moreover, the *Liuzzo* court found its decision not inconsistent with *Steele* v. *United States, supra,* and noted:

> "[w]here a person is injured because of conduct known to be wrongful relative to a potentially dangerous physical object, that person has information adequate to investigate who had control over the object." *Id.*

Whether applied to the power switch in *Steele* or to the experimental drugs in this action, the *Liuzzo* Court's reasoning is persuasive that a plaintiff with knowledge of wrongful conduct with regard to dangerous items has a duty to probe for the identity of those who may have been responsible for the danger. The Blauer Estate commenced an action against only the State of New York. No further inquiry similar to that anticipated by the *Liuzzo* Court was undertaken by Blauer's Estate in 1953. Accordingly, the Estate's alleged lack of knowledge as to the identify of *all* of the tortfeasors responsible for Harold Blauer's death did not delay accrual of the Estate's cause of action.

In sum, relying upon the standards set forth in *Liuzzo, Kubrick* and the decisions cited hereinabove, the Court finds that the undisputed facts demonstrate that Amy Blauer as Administratrix of the Estate of Harold Blauer had legally sufficient knowledge of *who* had caused decedent's death no later than April of 1953 when she brought suit against one tortfeasor, the State of New York, for negligently injecting Harold Blauer with the

drugs which caused his death. Further, at the latest, the Estate was aware of *what* had caused Blauer's death in May of 1955 when Dr. Hoch testified at the State Court of Claims settlement hearing.

It appearing that the Estate and plaintiff's mother (plaintiff's predecessor in interest) had knowledge of the fact of Blauer's injury and its causes (both "what" and "who") sufficient to protect themselves by seeking advice in the medical and legal community at least twenty years before the filing of the Federal Tort Claims action here, the cause of action is barred by the Act's two year statute of limitations.

B. *THE § 1983 CLAIMS*

In a § 1983 action federal courts must apply the statute of limitations applicable to the most similar State cause of action. *Board of Regents* v. *Tomanio*, 446 U.S. 478, 484, 100 S.Ct. 1790, 1795, 64 L.Ed.2d 440 (1980). In this Circuit, the three year limitations period provided in New York Civil Practice Law § 214(2) for actions "to recover upon a liability, penalty or forfeiture created or imposed by statute" governs § 1983 actions. *Pauk* v. *Board of Trustees of the City University*, 654 F.2d 856 (2d Cir. 1981); *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 499 & n.6 (2d Cir. 1980).[16]

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[16] Even assuming that the six year residual statute (NYCPLR § 213(1)) were the applicable limitations period, *Cullen* v. *Margiotta*, 618, F.2d 226, 228 n.2 (2d Cir. 1980), the result herein would be unaffected.

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Although the appropriate limitations period is determined by reference to state law, under § 1983, just as under the Federal Tort Claims Act, federal law determines when a claim accrues. *Pauk* v. *Board of Trustees of the City University, supra; Singleton* v. *City of New York,* 632 F.2d 185, 191 (2d Cir. 1980), *cert. denied,* 450 U.S. 920, 101 S.Ct. 1368, 67 L.Ed.2d 347 (1981). As set forth in *Singleton,* a federal claim accrues under § 1983 when the plaintiff "knows or has reason to know of the injury which is the basis of his action." *Id.* at 191. Thus, the analysis relevant to the accrual and the timeliness of plaintiffs' claims under the Federal Tort Claims Act set forth hereinabove applies with equal force to the claims asserted in plaintiffs' § 1983 action. Therefore, since the plaintiffs' cause of action accrued not later than May of 1955 (*See* p. 319 *supra*), the § 1983 claims herein filed in 1976 and 1978 are clearly time-barred by the three year statute of limitations.

Barrett contends, however, that the limitations period for her § 1983 claims should be tolled under the equitable tolling doctrine of fraudulent concealment.[17] In § 1983 actions the federal court "is obligated not only to apply the analogous New York statute of limitations to . . . constitutional claims, but also to apply the New York

[17] The limitations period of § 2401(b) of the Federal Tort Claims Act is jurisdictional and not subject to estoppel on grounds of fraudulent concealment. *Best Bearings Co.* v. *United States,* 463 F.2d 1177 (7th Cir. 1972); *Childers* v. *United States,* 442 F.2d 1299 (5th Cir.), *cert. denied,* 404 U.S. 857, 92 S.Ct. 104, 30 L.Ed.2d 99 (1971); *Peterson* v. *United States,* 428 F.2d 368 (8th Cir. 1970); *Frey* v. *Woodard,* 481 F.Supp. 1152 (E.D.Pa. 1979); *Lien* v. *Beehner,* 453 F.Supp. 604 (N.D.N.Y. 1978).

rule for tolling that statute of limitations." *Board of Regents* v. *Tomanio, supra,* 446 U.S. at 483, 100 S.Ct. at 1794; *Robertson* v. *Wegmann,* 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978). Under New York law the Court may use its equity jurisdiction to extend the applicable limitations period when the defendant either fraudulently *conceals the cause of action* from the plaintiff, *General Stencils, Inc.* v. *Chiappa,* 18 N.Y.2d 125, 272 N.Y.S.2d 337, 219 N.E.2d 169 (1966), or when the defendant *induces the plaintiff by positive misrepresentation to abstain from the suit* until after the statute of limitations period has run. *Simcuski* v. *Saeli,* 44 N.Y.2d 442, 406 N.Y.S.2d 259, 377 N.E.2d 713 (1972). *See Jordan* v. *Ford Motor Co.,* 73 A.D.2d 422, 426 N.Y.S.2d 359 (4th Dep't 1980). The plaintiffs contend that the defendants conspired to conceal from Blauer's Estate critical facts relevant to the circumstances surrounding decedent's death. It is averred that the role of the United States in the drug testing, the federal government's contribution to the settlement, the nature of the drugs used, and the purposes of the experimentation were withheld from the Estate before, during and after Amy Blauer commenced her action in the New York State Court of Claims.

Initially, and significantly, the Court notes that the fraudulent concealment portion of New York's equitable estoppel doctrine anticipates a situation where *a cause of action is so concealed* that *no litigation is commenced.* Clearly, that is not the situation here. Amy Blauer pursued at least one cause of action—to wit, the claims against the State of New York—in the State Court of Claims. In the view of this

Court, that filing might itself preclude plaintiffs' reliance on the equitable estoppel doctrine.[18]

Nonetheless, accepting the allegations of the complaints as true, defendants may be said to have concealed from Amy Blauer that she had a cause of action against the United States governmnent or officials thereof for their role in the drug experimentation program. This alleged concealment, while not to be applauded, does not in the view of this Court legally constitute fraudulent concealment as that doctrine has been enunciated by New York Courts.

In the absence of a fiduciary relationship mandating disclosure, failure to reveal the existence of a cause of action is not fraudulent concealment. *Simcuski* v. *Saeli, supra* at 443, 406 N.Y.S.2d 259, 377 N.E.2d 713. As this doctrine was recently articulated:

> "Where concealment without factual misrepresentation is claimed to have prevented a plaintiff from commencing an action within the Statute of Limitations, the courts have invoked estoppel only where there was a fiduciary relationship which gave defendant an obligation to inform plaintiff of facts underlying the claim (see *General Stencils* v. *Chiappa, supra;* 1 Weinstein-Korn-Miller, N.Y.Civ. Prac. par. 201.13).

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[18] Further, the identities and roles of the defendants James Cattell, Blauer's treating physician at the Insitute and Newton Bigelow, Commissioner of the New York State Department of Mental Hygiene, were known or were a matter of public record at the time of Blauer's death. Plaintiffs' claim of fraudulent concealment of the cause of action against these defendants is clearly without merit.

. . .

> A party against whom a claim exists is not, without more, under a duty to inform the injured party thereof, and such failure to inform does not constitute the kind of fraudulent concealment which gives rise to an estoppel (*De Vito* v. *New York Cent. System*, 22 A.D.2d 600, 257 N.Y.S.2d 895)."

Jordan v. *Ford Motor Co, supra*, 73 A.D.2d at 424, 426 N.Y.S.2d 359. Similarly, a defendant's silence as to particular facts surrounding an alleged cause of action does not constitute fraudulent concealment unless the relationship of the parties imposes a duty to disclose.

The sole defendant herein who may be said to be in a fiduciary relationship with the decedent or his Estate is Dr. James Cattell. *Simcuski* v. *Saeli, supra* at 449, 406 N.Y.S. 2d 259, 377 N.E.2d 713. Yet, there is no allegation—nor could there be—that Cattell concealed his own malpractice or negligence. Rather, it is alleged that he failed to disclose the negligence or participation of *other* tortfeasors. The Court rejects as untenable the plaintiffs' position that the duty to disclose which reposes in a fiduciary extends to causes of action which the fiduciary believes to exist against third parties.

The remaining defendants are federal officials, the Assistant Attorney General who represented the State in 1953, and the Commissioner of Mental Hygiene.[19] This Court is unaware of the existence of a fiduciary relationship or a special duty to disclose which is placed upon the govern-

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[19] See note 7 *supra*.

ment or its employees in civil litigation (*See* discussion *supra* at 314-315).

Yet, even if the Court were to find that the defendants herein were fiduciaries of Blauer's Estate, and that the acts of the defendants constituted concealment, the plaintiffs would nonetheless be unable to prevail on the equitable estoppel theory asserted as a counter to the defense of the statute of limitations.

A plaintiff asserting a claim of equitable estoppel to the statute of limitations must demonstrate that he himself was not negligent in discovering the wrong. *General Stencils, Inc.* v. *Chiappa, supra,* 18 N.Y.2d at 127, 272 N.Y.S.2d 337, 219 N.E.2d 169; McLaughlin, Practice Commentaries, C201:6(1) (1972). Equitable estoppel will not toll the statute of limitations when parties possess "timely knowledge" sufficient to place them "under a duty to make inquiry and ascertain for themselves all the relevant facts." *Augstein* v. *Levey,* 3 A.D.2d 595, 162 N.Y.S.2d 269 (1957), *aff'd,* 4 N.Y.2d 791, 173 N.Y.S.2d 27, 149 N.E.2d 528 (1958); *Renz* v. *Beeman,* 589 F.2d 735, 751 (2d Cir. 1978), *cert. denied,* 444 U.S. 834, 100 S.Ct. 65, 62 L.Ed.2d 43 (1979). In *Renz* v. *Beeman, id.,* the Second Circuit applied the New York law of equitable estoppel in an action to impose a constructive trust on shares of preferred stock. Finding the action time-barred because the plaintiffs had sufficient timely knowledge of the facts surrounding the alleged fraud to warrant further inquiry, the late Judge Gurfein noted:

> All that is necessary to commence the running of the statute is "knowledge of facts sufficient 'to suggest to a person of ordinary intelligence the probability that he has been defrauded.'" *Id.* at 751.

Opinion and Order of Pierce, J., Southern District of New York, dated August 27, 1981

Timely knowledge exists when a plaintiff can discover the concealment with reasonable diligence. *Id.* at 751-52. Thus, where affirmative acts of concealment are alleged, as here, the Court's inquiry must focus on whether Amy Blauer and her attorney negligently failed to discover a concealed cause of action. If they were aware of sufficient facts suggesting concealment then the Court must impose upon them a duty to conduct further inquiry with reasonable diligence. Failure to undertake such inquiry renders the claim of equitable estoppel on grounds of concealment unavailing. An examination of the facts herein reveals that the plaintiff was aware of sufficient information reflecting concealment so that, in the exercise of diligence, a reasonable person or her attorney would have inquired further. The record also reveals that plaintiff failed to commence a diligent inquiry despite having had a full and fair opportunity to do so. Under such circumstances, the plaintiff may not rely upon the law of equitable estoppel to toll the statute of limitations.

The indications that the state may have been withholding information were apparent. At the outset, Amy Blauer's first attorney had difficulty obtaining information about the drugs.

In the State Court of Claims action Amy Blauer succeeded in obtaining a court order for the production of medical records and allowing the examination before trial of two physicians who had treated the decedent. This order was "apparently ignored." (¶ 40 Complaint, *Barrett* v. *Hoffman*). Yet despite the past four years of discovery, the record is devoid of any indication that plaintiffs' predecessor sought to enforce that discovery order. The examination of the doctors was apparently scheduled to take

place on January 12, 1954 at the New York Psychiatric Institute. (Exh. Y to Def. Cattell's Motion to Dismiss). There is nothing to suggest why the depositions never occurred or what steps, if any, Amy Blauer took to ensure compliance with the Court's order. Rather, the record herein reflects Amy Blauer's complete failure to pursue court-ordered discovery prior to making the determination that she would settle the Estate's claims against the State for $18,000.

Later, at the settlement hearing before Judge Young of the State Court of Claims in 1955 there was reference to Harold Blauer's hospital file in the testimony of Dr. Hoch. Assistant Attorney General Marcus offered the file during Hoch's testimony on May 17, 1955 and asked the Court to impound it so that ". . . it is not subject to the view of anyone, . . . but it is taken into the physical possession of the Court and returned to me when your Honor has finished with his use of it." Amy Blauer's attorney responded: "I, of course, have no objection at this time . . . but if the need should arise for my examination of that record, I will then present my feelings in the matter. . . . I don't think I will want to see it. . . . Should the need arise I will ask the Court's permission to see it." (Transcript of State Court of Claims Hearing, Exh. HH. Def. Cattell's Motion to Dismiss). Significantly, Blauer's attorney declined to cross-examine Dr. Hoch who was apparently aware of important facts relevant to the drug studies performed on Harold Blauer. In addition, the document which Amy Blauer signed released the State, the hospital, the doctors, and "the organization, group, governmental body or agency which furnished the drug used in the drug studies which resulted in the death of Harold Blauer." Yet, despite this

language to which the State's attorney expressly referred at least twice during the settlement hearing (*see* p. 312 *supra*), neither Amy Blauer nor her attorney appear to have asked for any further clarification as to whom the release encompassed. This failure to pursue discovery, coupled with the failure at the settlement hearing to examine a witness who was familiar with the relevant facts surrounding Blauer's death, are particularly critical in light of the clearly apparent veil of secrecy in which the State sought to shroud the proceedings. The efforts to achieve secrecy were quite evident from the difficulties which Amy Blauer's attorney had in obtaining information about the drugs (*see* p. 318 *supra*), the State's apparent failure to comply with the discovery order, the manner in which the state assiduously protected the hospital records at the hearing, and the broad language of the release encompassing "the organization, group, or governmental body" which provided the drugs—all of these events were ample warning signals that further inquiry was warranted. Having failed to make further inquiry, the Estate cannot be heard at this late date to claim that the cause of action against the United States was fraudulently concealed.

The Court rejects as mere conjecture plaintiffs' claim that the State of New York and hospital officials would not have revealed the salient facts surrounding Blauer's death if the Estate had pursued discovery.[20] Even if supported by the record herein, this averment does not

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[20] See Exh. 19, Plaintiffs' Memorandum in Support of Motion for Reargument and deposition of David Marcus. These documents indicate that State and federal officials may have revealed the experimental nature of the drugs and that the drugs were supplied by the federal government.

lift from the plaintiffs the duty to inquire or to use due diligence in pursuit of such information when the facts reveal that such inquiry is warranted.

It appearing that the plaintiffs may not rely upon the fraudulent concealment principles of equitable estoppel to toll the statute of limitations in this action, and it further appearing that the cause of action herein accrued more than three years prior to plaintiffs' filing of the complaint in 1965, the § 1983 claims are time barred.

CONCLUSIONS

The plaintiffs' claims against the United States under the Federal Tort Claims Act accrued not later than May of 1955 and are time barred under the Act's two year statute of limitations. The plaintiffs' claims against the individual defendants under § 1983 are barred under the applicable three year statute of limitations. The principles of equitable estoppel on the grounds of fraudulent concealment will not operate herein to toll the limitations period under § 1983 and the Federal Tort Claims Act. Accordingly, the defendants' motions to dismiss these actions as time barred are granted. The Clerk shall enter judgment for the defendants in each of these three actions.

SO ORDERED.

Order Denying Rehearing

(Filed—December 1, 1982)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 748, 863, 864

DOCKET Nos. 81-6192, 81-7690, 81-7700

August Term, 1981

ELIZABETH BARRETT,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ELIZABETH BARRETT,

Plaintiff-Appellant,

v.

DAVID MARCUS, *et al.*,

Defendants-Appellees.

ELIZABETH BARRETT,

Plaintiff-Appellant,

v.

FREDERICK LOUGH,

Defendant-Appellee.

Order Denying Rehearing

Before:

NEWMAN and CARDAMONE, *Circuit Judges,* and BURNS, *District Judge.**

The petitions for rehearing filed by James Cattell, Newton Bigelow, David Marcus and the federal defendants are hereby denied. Denial of rehearing is without prejudice, however, to the filing of supplemental motions for summary judgment in the district court on behalf of any individual defendant in light of rulings in our opinion reversing summary judgment as to all defendants, or in light of matters previously raised below but not addressed in our opinion.

JON O. NEWMAN, U.S.C.J.

RICHARD J. CARDAMONE, U.S.C.J.

EILEN BREE BURNS, D.C.J.

Order Denying Rehearing

(Filed—December 1, 1982)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 81-6192
81-7690
81-7700

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the first day of December, one thousand nine hundred and eighty-two.

ELIZABETH BARRETT, as Administratrix of the Estate of Harold Blauer, Deceased,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ELIZABETH BARRETT,

Plaintiff-Appellant,

v.

Order Denying Rehearing

DAVID MARCUS, NEWTON BIGELOW, JAMES CATTELL, GEORGE LEONARD, VAN SIM, WILLIAM CREASEY, JOHN DERRICK, HARRIS NORTH, HERBERT GREER and the ESTATE OF AMEDEO MARAZZI,

Defendants-Appellees.

ELIZABETH BARRETT, as an individual and as Administratrix DBN of the Etate of Harold Blauer, Deceased,

Plaintiff-Appellant,

v.

FREDERICK LOUGH,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellees, Newton Bigelow, James Cattell, David Marcus and the United States of America,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petitions for rehearing are DENIED.

It is further noted that the suggestion for rehearing in banc have been transmitted to the judges of the court in

regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO, Clerk
by: FRANCIS X. GINDHART
Chief Deputy Clerk

Office-Supreme Court, U.S.
FILED
MAY 31 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1449

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

JAMES CATTELL,

Petitioner,

v.

ELIZABETH BARRETT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit properly held that there were disputed issues of fact with respect to Petitioner James Cattell's statute of limitations defense which precluded summary judgment for the defendant?

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent submits this brief in opposition to James Cattell's Petition for a writ of certiorari. Respondent opposes the petition, which at best is premature because discovery has not been completed and the case has yet to go to trial.

STATEMENT OF THE CASE

This Petition arises from the death of Harold Blauer in 1953. The facts should shock the conscience of this Court. Mr. Blauer, who was admitted to the New York State Psychiatric Institute in 1952, was turned into a human guinea pig upon whom the Army Medical Corps performed experiments, without his consent, by injecting him with synthetic mescaline derivatives. Mr. Blauer was

killed by the fifth such injection. Thereafter, the governments of the United States and of the State of New York engaged in a concerted effort to conceal the full facts underlying Mr. Blauer's death. Finally, in 1975, the Secretary of the Army began to disclose this astounding episode.

Following the Army's 1975 disclosures, Elizabeth Barrett, one of Mr. Blauer's daughters, began these actions on behalf of Mr. Blauer's heirs and estate. Ms. Barrett asserts two essential claims. First, she seeks recovery against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, for negligent initiation, implementation and administration of the secret chemical experimentation program that cost Mr. Blauer his life. Second, Ms. Barrett seeks recovery under 42 U.S.C. § 1983 and *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against the individuals who on behalf of the United States and the State of New York conspired to withhold or cover up the full and true circumstances surrounding Mr. Blauer's death. Ms. Barrett contends this resulted in the deprivation, without due process, of the full value of the causes of action relating to Mr. Blauer's death.

The defendants, including the petitioner here, moved to dismiss, *inter alia*, on the ground that the statute of limitations barred the lawsuit. Ms. Barrett argued that defendants' concealment of material facts tolled the running of the statute of limitations until 1975, when the Army's disclosure of certain of these events suggested the real circumstances of his death. The Second Circuit agreed with Barrett, holding that under the so-called "diligence-discovery" rule (a defendant's deliberate concealment of the material facts tolls the running of the statute of limitations until the plaintiff knows or should

have known of the basis for the lawsuit), Barrett had presented facts and allegations sufficient to preclude the entry of summary judgment in favor of the defendants.

In particular, some of the facts suggesting fraudulent concealment which the Second Circuit found were sufficient to make out a triable issue of fact on that question included:

—the Army took steps which left "the deliberate false impression that the drug used on Blauer was for therapeutic purposes," when Ms. Barrett's experts concluded that the sole purpose of the injections was human experimentation;

—the medical reports which followed Blauer's death "led to the further misimpression that a heart condition was at least partly responsible for Blauer's demise" when Ms. Barrett's experts concluded that the true cause of death was "poisoning by the injected drug";

—the defendants, following commencement of a wrongful death action by Mr. Blauer's estate against the State of New York in 1953, urged the postponement of depositions, the withholding of documents, the removal of documents beyond to plaintiff's subpoena power and the payment by the United States of one-half of the $18,000 settlement, to keep the Army's role in Mr. Blauer's death secret;

—an Assistant Attorney General of New York met with a judge of the New York Court of Claims *ex parte* prior to a hearing on the $18,000 settlement which was scheduled before the Court of Claims, to tell the judge the true underlying facts and to impress on the judge the need for this information to be kept secret.

Faced with these and other facts uncovered by Ms. Barrett only after the Army's 1975 disclosures, the Second

Circuit concluded that "this evidence of intentional concealment of material facts" warranted "the application of the diligence-discovery rule." The diligence-discovery rule, of course, is well-established federal law. *See United States* v. *Kubrick*, 444 U.S. 111 (1979).

The petitioner here, James Cattell, administered the Army's drug program at the New York Psychiatric Institute. He was also the author of the medical report on Mr. Blauer's death which the Second Circuit found created a "misimpression" that Blauer's death was due at least in part to heart disease, rather than due solely to the drug injection. Cattell stated in the U.S. Army Inspector General's Report that the material he injected could have been "dog piss," for all he knew. In the face of such evidence, Cattell's contention that he "had no involvement in the alleged post-death cover-up" (Pet. at 23) is disingenuous at best. Cattell has not yet been deposed in this action, due to restrictions placed on discovery until the statute of limitations issue was resolved. Thus, additional evidence of his involvement and the involvement of others may still be developed.

Significantly, Cattell is the only defendant who has filed a Petition for a writ of certiorari from the Second Circuit's decision at this juncture. All of the other defendants evidently agree that the case should be sent back to the District Court for further pre-trial proceedings, and for trial. In particular, the Solicitor General has declined to seek a writ of certiorari on behalf of the defendants whom the Attorney General represents.

ARGUMENT

I.

THE PETITION IS PREMATURE.

Because Cattell is not asking this Court to review a final judgment following trial, the petition is premature. Cattell asks this Court to review a decision of the Second Circuit reversing a grant of summary judgment to the defendants by the District Court. The effect of the Second Circuit's ruling is to deny summary judgment to Cattell, but to permit Cattell to raise his statute of limitations arguments and all of his other arguments again when the case is tried. As the Second Circuit said, "[w]e express no opinion as to the appropriate disposition of these issues at trial." Cattell therefore can raise with the ultimate trier of fact in the District Court the same issues which he seeks now to present to this Court. Furthermore, after final judgment is entered, Cattell will still have the opportunity to raise these same issues with this Court, together with any other questions raised between now and the end of the trial of this case. The petition is therefore premature, because these issues should be fully explored by the lower courts before they are brought to this Court. Petitioner seeks piecemeal review, which is a waste of the scarce time and resources of this Court.

For these reasons, this Court does not ordinarily review a non-final judgment. There is no reason to vary that rule in this case.

II.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

As is evident from the Petition, Cattell has not suggested that there is any conflict between the various circuits on any of the questions which he now raises.

Therefore, there is no need for this Court to review this case to settle divergences in federal decisional law.

III.

THE PETITIONER HAS NOT PRESENTED ANY IMPORTANT ISSUE OF FEDERAL LAW WHICH WARRANTS RESOLUTION BY THIS COURT.

Cattell has not raised any novel or important questions which now warrant resolution by this Court. In the present procedural posture of this case, the real issue presented by Cattell's Petition is whether the Second Circuit correctly concluded that Ms. Barrett has made out a sufficient case to go to trial on the applicability of the "diligence-discovery" rule and on other issues. These questions involve the application of well-established rules to particular record facts—which is not the function of this Court. This Court is not the proper forum to review the question of whether Barrett has made out a triable issue of fact on the question of Cattell's role in the concealment of the true cause of Mr. Blauer's death. (Pet. at 23-25) It is the function of the lower federal courts to take rules which have been fashioned by this Court, such as the diligence-discovery rule (*see United States* v. *Kubrick*, 444 U.S. 111 (1979)), and to apply those rules to a given set of facts. A Petition for a writ of certiorari which asks this Court to undertake that function is improper and should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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